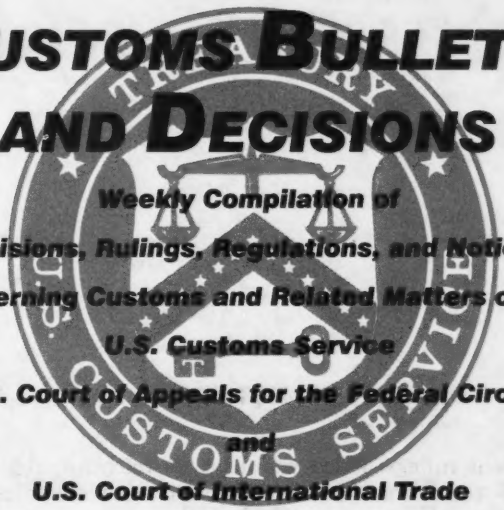
CUSTOMS BULLETIN AND DECISIONS



Weekly Compilation of
Decisions, Rulings, Regulations, and Notices
Concerning Customs and Related Matters of the
U.S. Customs Service
U.S. Court of Appeals for the Federal Circuit
and
U.S. Court of International Trade

VOL. 29 MAY 3, 1995 NO. 18

This issue contains:

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DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE

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U.S. Customs Service

General Notices

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, DC, April 18, 1995.

The following documents of the United States Customs Service, Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and U.S. Customs Service field offices to merit publication in the CUSTOMS BULLETIN.

HARVEY B. FOX,
Director,
Office of Regulations and Rulings.

PROPOSED MODIFICATION OF RULING LETTER RELATING TO TARIFF CLASSIFICATION OF A WALLHANGING/QUILT

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed modification of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify a ruling pertaining to the tariff classification of a wallhanging/quilt. Comments are invited on the correctness of the proposed ruling.

DATE: Comments must be received on or before June 2, 1995.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Commercial Rulings Division, 1301 Constitution Avenue, NW (Franklin Court), Washington, DC 20229. Comments submitted may be inspected at the Commercial Rulings Division, Office of Regulations and Rulings, located at Franklin Court, 1099 14th Street, NW, Suite 4000, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Cathy Braxton, Textile Classification Branch (202) 482–7048.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify a ruling pertaining to the tariff classification of a wallhanging/quilt.

In Headquarters Ruling Letter (HRL) 084034, dated April 29, 1989, a wallhanging/quilt was classified in subheading 9404.90.9010 of the Harmonized Tariff Schedule of the United States Annotated (HTSUSA), which provides for articles of bedding and similar furnishings. HRL 084034 is set forth in Attachment A to this document.

Upon further examination of the subject article, it is Customs belief that it is not an article of bedding or a similar furnishing. Due to the irregular sizing of the article, it is incapable of adequately covering a standard size mattress, so that use as bed linen is not practical. Therefore, the subject article is properly classifiable in subheading 6304.92.0000, HTSUSA, which provides for other furnishings, excluding those of heading 9404.

Customs intends to modify HRL 084034 to reflect the proper classification of the subject article in subheading 6304.92.0000, HTSUSA. Before taking this action, consideration will be given to any written comments timely received. Proposed HRL 957645 modifying HRL 084034 is set forth in Attachment B to this document.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the date of this notice.

Dated: April 18, 1995.

HUBBARD VOLENICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington. DC, April 24, 1989.

CLA–2 CO:R:C:G 084034 SM
Category: Classification
Tariff No. 9404.90.9010 and 9404.90.9020

MS. DOLORES TIONGCO
QUINTESSENTIAL QUILTS
578 Westgate Drive
State College, PA 16803

Re: Tariff classification of quilts.

DEAR MS. TIONGCO:

Your letter of January 20 requests a tariff classification ruling for certain quilts to be made in the Philippines.

Facts:

You state that you intend to supply to the Philippines 100 percent cotton U.S. fabric in 25-yard bolts; 100 percent polyester batting in 120-inch-square pieces to be cut into 60-inch-square pieces; quilting thread; and labels. We assume that all operations necessary to manufacture the finished quilts will be performed in the Philippines. You have also submitted a sample quilt. It is about 52 inches square and has a four-inch-wide "sleeve" on the back along one edge. The face displays colorful designs formed by piecing; the back is a solid fabric. A folded bias edging of approximately 8 mm, measured to the fold, finishes all four sides.

Issue:

How is the quilt classified?

Law and Analysis:

Classification under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) is in accordance with the General Rules of Interpretation (GRI's). GRI 1 provides that classification is determined first in accordance with the headings of the tariff and any relative section or chapter notes, and then, if the headings and notes do not require otherwise, in accordance with the remaining GRI's.

Heading 9404, HTSUSA, provides for "* * * articles of bedding and similar furnishing (for example, mattresses, quilts, eiderdowns * * *) fitted with springs or stuffed or internally fitted with any material * * *." Since no definition of *quilts* is given, the common meaning of the term applied:

> 1. a bed coverlet made of two layers of cloth of which the top one is usu. pieced or appliqued and having a filling of wool, cotton, or down held in place by stitched designs or tufts worked through all thicknesses.
>
> *Webster's Third New International Dictionary Unabridged*

> 1. a bed cover made of two plies of fabric with a filling or wadding of cotton, wool, down, manmade fiber, etc., stitched through in patterns or tufted. * * *
>
> *Fairchild's Dictionary of Textiles*

Thus, in general a quilt is a bedcover consisting of three layers, one of which is a filling, all held together by stitching or tufts through all thicknesses. The submitted sample, stated to be a quilt, conforms to this definition and, by virtue of its filling, meets the requirements of the tariff provision that it be "internally fitted with any material."

The subheadings under heading 9404, HTSUSA, providing for quilts, eiderdowns and comforters, require that these goods be classified as of cotton, of man-made fibers, or of other textile materials. Neither the legal notes nor the Explanatory Notes (EN), the official interpretation of the HTSUSA at the international level, indicate how this determination is to be made in the case of a quilt consisting of more than one textile material. However, Additional U.S. Rule of Interpretation 1(d) of the tariff provides that "the principles of section XI regarding mixtures of two or more textile materials shall apply to the classification of goods in any provision in which a textile material is named."

Note 2 and Subheading Note 2 of Section XI, which covers textiles and textile articles generally, provide that goods of this section consisting of two or more textile materials are

to be regarded as consisting wholly of that textile material which predominates by weight over each other single textile material. Applying this principle to quilts of heading 9404, HTSUSA, as directed by U.S. Rule of Interpretation 1(d), we conclude that such goods are classifiable according to the textile material of which they are in chief weight.

Holding:

If the cotton predominates by weight, the quilts are classified under subheading 9404.90.9010, HTSUSA, textile category 362. If the man-made fiber predominates, they are classified under subheading 9404.90.9020, HTSUSA, textile category 666.

Because of the changeable nature of the statistical annotation, *i.e.*, the ninth and tenth digits of the tariff number, and the textile restraint categories, you should contact your local Customs office before importation of this merchandise to determine the current status of any import restraints or requirements.

JOHN B. ELKINS,
(for John Durant, Director,
Commercial Rulings Division.)

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC

CLA-2 R:C:T 957645 CAB
Category: Classification
Tariff No. 6304.92.0000

MS. DOLORES TIONGCO
QUINTESSENTIAL QUILTS
578 Westgate Drive
State College, PA 16803

Re: Modification of HRL 084034, dated April 29, 1989; classification of wallhanging/quilt; other furnishings; Heading 9404; Heading 6304.

DEAR MS. TIONGCO:

This is in reference to Headquarters Ruling Letter (HRL) 084034, dated April 29, 1989, issued to you from Customs. Since the issuance of that ruling, Customs has reexamined your submission as well as the conclusion and determined that the ruling was decided incorrectly. Accordingly, this ruling modifies HRL 084034.

Facts:

The merchandise at issue is referred to as 100 percent cotton quilt. The article, filled with polyester batting, is approximately 52 inches square and has a four inch wide sleeve along the back edge which allows the item to be hung for decorative purposes. The front of the article contains colorful designs which are formed by piecing and the back is constructed of a solid fabric. A folded bias edging that is approximately 8 mm acts as a finish on all four sides.

In HRL 084034 the subject article was classified in subheading 9404.90.9010 of the Harmonized Tariff Schedule of the United States Annotated (HTSUSA), which provides for articles of bedding and similar furnishings. Customs is of the opinion that the subject article is properly classifiable under subheading 6304.92.0000, HTSUSA, which provides for other furnishings, excluding those of heading 9404.

Issue:

Whether the subject article is classifiable under heading 9404, HTSUSA, or Heading 6304, HTSUSA?

Law and Analysis:

Classification of goods under the HTSUSA is governed by the General Rules of Interpretation (GRI's). GRI 1 provides that classification shall be determined according to the

terms of the headings and any relative section or chapter notes. Merchandise that cannot be classified in accordance with GRI 1 is to be classified in accordance with subsequent GRI's taken in order.

As stated above, the subject articles are potentially classifiable under two distinct headings, Heading 6304, HTSUSA, or Heading 9404, HTSUSA.

Heading 9404, HTSUSA, provides for, mattress supports; articles of bedding and similar furnishing (for example, mattresses, quilts, eiderdowns, cushions, pouffes and pillows) fitted with springs or stuffed or internally fitted with any material, or of cellular rubber or plastics, whether or not covered. The Explanatory Notes to the Harmonized Commodity Description and Coding System (EN), although not legally binding, are the official interpretation of the nomenclature at the international level. The EN to Heading 9404, HTSUSA, state, in pertinent part:

This heading covers:

* * * * * * *

(B) **Articles of bedding and similar furnishing** which are sprung or stuffed or internally fitted with any material (cotton, wool, horsehair, down, synthetic fibres, etc.) or are of cellular rubber or plastics * * *. For example:

* * * * * * *

(2) Quilts and bedspreads (including counterpanes, and also quilts for baby-carriages), eiderdowns and duvets (whether of down or any other filling), mattress-protectors (a kind of thin mattress placed between the mattress itself and the mattress support), bolster, pillows, cushions, pouffes, etc.

The Modern Textile and Apparel Dictionary, (1973), defines a quilt as "usually a bed covering of two thicknesses of material with wool, cotton, or down batting in between for warmth." *Webster's II New Riverside University Dictionary,* (1984), defines a quilt as "a bed covering consisting of two layers of fabric with a layer of batting or feathers between and stitched firmly together, usually in a decorative pattern. It defines bedding as "bedclothes, which are coverings, such as sheets and blankets, used on a bed." *Webster's New World Dictionary,* (1988), defines bedding as "mattresses and bedclothes." In order to determine if the subject articles are classifiable under Heading 9404, HTSUSA, Customs must decide whether they are considered bedding for tariff classification purposes.

There is no provision in the nomenclature or the EN which specifies that articles classifiable under Heading 9404, HTSUSA, must be able to cover a bed. However, it is Customs opinion, that implicit in an article being considered "bedding" is that it be capable of serving a primary function of covering a bed sufficiently so as to make such use practicable.

After conferring with numerous mattress and bed linen manufacturers in the United States, Customs has determined that there are standard commercial sizes for mattresses and bed coverings. The standard sizes are as follows:

Mattress sizes		*Quilts and bedspreads*
Twin	39″ × 75″	66″ × 86″
Full	54″ × 75″	81″ × 86″
Queen	60″ × 80″	86″ × 86″
King	78″ × 80″	100″ × 90″

Customs checked with various manufacturers of crib mattresses and received various dimensions for crib mattresses. The differing dimensions are as follows:

Mattress sizes	
Crib	27″ × 51″
	27″ × 51⅝″
	27″ × 54″
	28″ × 52″
	27½″ × 52″

Depending on the particular bedding manufacturer, the dimensions of crib quilts varied greatly.

The preceding discussion leads us to the question of whether the subject article is a quilt for tariff classification purposes. The article is comprised of two layers of material with a layer of polyester batting stitched in between the two layers of material. It also contains a sleeve that would allow it to be hung on the wall for adornment. The sleeve is a consideration in the tariff classification process, nevertheless, Customs views it as a convenience to the purchaser and not determinative of the classification. The instant article meets the definition for quilts provided in the lexicographic sources.

The dimensions of the subject article are 52″ × 52″. After viewing, these dimensions in light of the standard size mattresses and bedding listed, it is clear to Customs that the subject article would not sufficiently cover any of the standard size mattresses. Either the subject article would be too small to adequately cover the twin, full, queen, or king size mattresses or too large for the crib size mattresses. As the subject article deviates significantly from the stated standard sizes for quilts and therefore, would be incapable of adequately covering a bed, Customs is of the opinion it is not a quilt for tariff classification purposes.

It is important to note that except for the irregular dimensions, the subject article has the general appearance and construction of a quilt. Therefore, if the article were to meet the standard measurements for the crib, twin, full, queen, or king size quilts as recognized in domestic industry, it would be classified under Heading 9404, HTSUSA. Customs is aware that in certain limited instances, goods will be imported as quilts and vary slightly from the standard quilt sizes. Thus, Customs is reluctant to provide specific dimensions and a dividing line for goods that are potentially classifiable as quilts or bedding. Consequently, those goods with the general appearance of bedding which slightly deviate from the standard quilt sizes and could still adequately cover an entire bed so that use as a quilt is reasonable and likely, would also be classifiable under Heading 9404, HTSUSA.

Heading 6304, HTSUSA, provides for other textile furnishing articles, excluding those of Heading 9404. The EN to Heading 6304, HTSUSA, state, in pertinent part:

* * * * * * * *

> These articles include wall hangings and textile furnishings for ceremonies (e.g., weddings or funerals); mosquito nets; bedspreads (but **not including** bed coverings of **heading 94.04);** cushion covers, loose covers for furniture, * * *

In Headquarters Ruling Letter (HRL) 087551, dated November 9, 1990, Customs confronted the issue of the proper tariff classification of an article described therein as a "bed throw". The article measured 46 inches by 60 inches and had fringe on all four sides. Customs determination was, as follows:

> Both the sample articles (46 × 60) and the imported article (54 × 60) are too small to cover a bed; moreover, bed throws commonly have fringe on only three sides. Thus, Customs does not consider the instant article to be a bed throw but instead, views it as similar to a furniture throw or cover. In either case, however, the article is classifiable as a furnishing of heading 6304.

Recently, in HRL 957410, dated February 3, 1995, Customs determined that quilted articles which measured 50 × 60 inches and 50 × 50 inches and contained rod pockets to enable them to be hung on the wall for decorative purposes were classifiable as other furnishings under Heading 6304, HTSUSA.

In HRL 84034, Customs stated the following;

> [I]n general a quilt is a bedcover consisting of three layers, one of which is a filling, all held together by stitching or tufts through all thicknesses. The submitted sample stated to be a quilt, conforms to this definition and, by virtue of its filling, meets the requirements of the tariff provision that it be "internally fitted with any material."

The aforementioned statement is correct, however, what Customs did not consider before determining that the article was a quilt for tariff classification purposes was that it be capable of covering a bed so that use as a quilt was practicable. The article at issue measures 52 inches square. The measurements significantly deviate from standard quilts and bedspread sizes. The article is incapable of covering any standard size mattress. As a result of this deviation, Customs does not believe that classification as a quilt is correct. Consequently, the instant article is classifiable as other furnishing articles under Heading 6304, HTSUSA.

Holding:

Based on the foregoing, the subject article is classifiable in subheading 6304.92.0000, HTSUSA, which provides for other furnishing articles, excluding those of heading 9404, not knitted or crocheted, of cotton. The applicable rate of duty is 7.1 percent *ad valorem* and the textile restraint category is 369.

The designated textile and apparel category may be subdivided into parts. If so, visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes, to obtain the most current information available, we suggest

that you check, close to the time of shipment, *The Status on Current Import Quotas (Restraint Levels)*, an internal issuance of the U.S. Customs Service, which is available for inspection at your local Customs office.

Due to the classifiable nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories applicable to textile merchandise, you should contact your local Customs office prior to importing the merchandise to determine the current status of any import restraints or requirements.

JOHN DURANT,
Director,
Commercial Rulings Division.

PROPOSED MODIFICATION OF RULING LETTER RELATING TO CLASSIFICATION OF A METALLIC BRAIDED CORD

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed modification of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify a ruling pertaining to the tariff classification of a metallic braided cord. Comments are invited on the correctness of the proposed ruling.

DATE: Comments must be on before June 2, 1995.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Commercial Rulings Division, 1301 Constitution Avenue, NW, Franklin Court, Washington, DC 20229. Comments submitted may be inspected at the Commercial Rulings Division, Office of Regulations and Rulings, located at Franklin Court, 1099 14th Street, NW, Suite 4000, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Cynthia Reese, Textile Classification Branch, (202–482–7094).

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify a ruling pertaining to the tariff classification of a metallic braided cord which was classified as a braid

in the piece, other, of man-made fiber in subheading 5808.10.3010, Harmonized Tariff Schedule of the United States Annotated (HTSUSA), in New York ruling letter (NYRL) 883070 of April 5, 1993. Classification of the cord was based upon classification by chief weight utilizing Note 2(A), Section XI, HTSUSA.

NYRL 883070 is set forth in Attachment "A" to this document. Proposed HRL 957751 modifying NYRL 883070 is set forth in Attachment "B" to this document. Before taking this action, consideration will be given to any written comments timely received.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: April 18, 1995.

HUBBARD VOLENICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, NY, April 5, 1992.

CLA–2–58:S:N:N6:351 883073
Category: Classification
Tariff No. 5808.10.3010,
5808.10.3090 and 6002.20.6000

MS. BARBARA HO
720 Iwilei Road, Ewa Wing 280
Honolulu, HI 96817

Re: The tariff classification of decorative cords from China.

DEAR MS. HO:

In your letter dated February 11, 1993, you requested a classification ruling.

You have submitted eight samples of decorative cords of braided construction. According to your letter, the principal uses of these cords in the United States will be for chinese knotting, ornamental decoration tying, and holding neckpieces or bracelets. We assume that the cords will be imported in continuous length on rolls. Three of the items are of braided construction, as follows: a 5/32 inch diameter silver cord, an oval-shaped silver cord measuring 1/8 inch in its maximum cross-sectional dimension, and a 1/16 inch diameter gold cord. In a report from our New York Customs laboratory, the respective compositions of these three items is as follows: 73.9% braided core polyester, 22.4% metallic yarn, and 3.7% braided core collar; 51.2% metallic yarn and 48.8% polyester core; and 61.6% metallic yarn and 38.4% polyester core. Based upon our lab's weight breakdown, the thick 5/32 inch diameter cord is in chief weight of man-made fibers and the two thinner cords are in chief weight of metalized strip. All three braids have tubular metalized braid on the outer surfaces.

The five remaining cords are believed to be of warp knitted construction. According to our laboratory, the 3/16 inch diameter sample, which is representative of this group, consists of parallel multifilament yams and mylar type metallic yarns which interlace and are held in place by a multifilament yarn forming a single chain stitch. The construction is tubular

and has a core of four 6-ply yarns. The sample is composed of man made fibers (nylon, rayon), 99.4%; and mylar type metallic yarn, 0.6%; by weight.

The applicable subheading for the thick silver cord with a braided core will be 5808.10.3010, Harmonized Tariff Schedule of the United States (HTS), which provides for braids In the piece, * * *, other, * * *, of man-made fibers. The duty rate will be 8.4 percent *ad valorem*.

The two thin silver or gold cords will be classifiable under provision for braids in the piece, * * *, other, other, in subheading 5808.10.3090, HTS. The rate of duty will be 8.4 percent *ad valorem*.

The five knitted cords will be classifiable under the provision for other knitted or crocheted fabrics; other, of a width not exceedIng 30 cm; other; of man-made fibers; in subheading 6002.20.6000, HTS. The rate of duty will be 8.6 percent *ad valorem*.

The cords classifiable in subheadings 5808.10.3010 and 6002.20.6000, HTS, fall within textile category designations 229 and 222, respectively. Based upon international textile trade agreements products of China are subject to quota and the requirement of a visa.

The designated textile and apparel categories may be subdivided into parts. If so, visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes, to obtain the most current information available, we suggest that you check, close to the time of shipment, the *Status Report on Current Import Quotas (Restraint Levels)*, an internal issuance of the U.S. Customs Service, which is available for inspection at your local Customs office.

This ruling is being Issued under the provisions of Section 177 of the Customs Regulations (19 C.F.R. 177).

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is imported. If the documents have been filed without a copy, this ruling should be brought to the attention of the Customs officer handling the transaction.

JEAN F. MAGUIRE,
Area Director,
New York Seaport.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC

CLA-2 CO:R:C:T 957751 CMR
Category: Classification
Tariff No. 5808.10.9000

MS. BARBARA HO
720 Iwilei Road, Ewa Wing 280
Honolulu, HI 96817

Re: Modification of New York Ruling Letter (NYRL) 883070; classification of a braided metallic yarn; essential character.

DEAR MS. HO:

On April 5, 1993, Customs issued NYRL 883070 to you regarding the classification of various decorative cords from China. We have reviewed that ruling and found we erred in the classification of one of the cords at issue therein. The item is described below.

Facts:

The cord at issue was described in NYRL 883070 as a 5/32 inch diameter silver cord consisting of a braided core of polyester with an outer covering of tubular braided metallic yarn. The Customs laboratory in New York reported the composition of the cord as: 73.9 percent braided core polyester, 22.4 percent metallic yarn, and 3.7 percent braided core collar.

The yarn was classified in subheading 5808.10.3010, Harmonized Tariff Schedule of the United States Annotated (HTSUSA), as a braid in the piece, other, of man-made fibers. This classification was based on the chief weight of the cord.

Issue:

What is the proper classification of the cord at issue and on what basis is the determination made?

Law and Analysis:

Classification of goods under the HTSUSA is governed by the General Rules of Interpretation (GRIs). GRI I provides that "classification shall be determined according to the terms of the headings and any relative section or chapter note and, provided such headings or notes do not otherwise require, according to [the remaining GRI 5 taken in order]."

Note 2(A), Section XI, provides, in relevant part:

> Goods classifiable in chapters 50 to 55 or in heading 5809 or 5902 and of a mixture of two or more textile materials are to be classified as if consisting wholly of that one textile material which predominates by weight over each other single textile material.
>
> * * * * * * *

Subheading Note 2, Section XI, provides, in part:

> (A) Products of chapters 56 to 63 containing two or more textile materials are to be regarded as consisting wholly of that textile material which would be selected under note 2 to this section for the classification of a product of chapters 50 to 55 consisting of the same textile materials.
>
> (B) For the application of this rule:
>
> (a) Where appropriate, only the part which determines the classification under general interpretative rule 3 shall be taken into account;
>
> * * * * * * *

The braid at issue was properly classified in heading 5808, HTSUSA, as a braid in the piece. Therefore, Subheading Note 2 is the applicable provision. This provision requires the classification be determined using GRI 3. Thus, it is not a matter of classifying based on the component in chief weight. Customs erred in NYRL 883073 by using chief weight in deciding the proper classification of the cord.

The subject braided cord consists of an exterior metallic braid with a braided man-made fiber core. As such, it is a composite good. GRI 3(b) directs that for a composite good consisting of different materials, which cannot be classified by reference to GRI 3(a), classification shall be according to the component that imparts the essential character of the good. In this case, we believe the metallic braid outer covering imparts the essential character of the good.

Holding:

The subject metallic braided cord is classified in subheading 5808.10.9000, HTSUSA, which provides for braids in the piece, other than braids in the piece suitable for making or ornamenting headwear, other than of cotton or man-made fibers, dutiable at 8 percent *ad valorem*. At the time NYRL 883073 was issued, the proper classification was subheading 5808.10.3090, HTSUSA, which was the predecessor to subheading 5808.10.9000, HTSUSA.

The designated textile and apparel category may be subdivided into parts. If so, the visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes, to obtain the most current information available, we suggest you check, close to the time of shipment, the *Status Report On Current Import Quotas (Restraint Levels)*, an internal issuance of the U.S. Customs Service which is updated weekly and is available **for inspection** at your local Customs office.

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories, you should contact your local Customs office prior to importation of this merchandise to determine the current status of any import restraints or requirements.

JOHN DURANT,
Director,
Commercial Rulings Division.

PROPOSED MODIFICATION OF RULING LETTER RELATING TO CLASSIFICATION OF A YARN

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed modification of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify a ruling pertaining to the tariff classification of a polyester yarn. Comments are invited on the correctness of the proposed ruling.

DATE: Comments must be received on or before June 2, 1995.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Commercial Rulings Division, 1301 Constitution Avenue, NW, Franklin Court, Washington, DC 20229. Comments submitted may be inspected at the Commercial Rulings Division, Office of Regulations and Rulings, located at Franklin Court, 1099 14th Street, NW, Suite 4000, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Cynthia Reese, Textile Classification Branch, (202–482–7094).

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625 as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify a ruling pertaining to the tariff classification of a polyester yarn which was classified as yarn (other than sewing thread) of synthetic staple fibers, not put up for retail sale, in subheading 5509.22.0010, Harmonized Tariff Schedule of the United States Annotated (HTSUSA), in New York ruling letter (NYRL) 890070 of September 20, 1993. Classification of the yarn was based upon a report from the New York Customs laboratory that the yarn at issue was not "dressed". Customs has recently learned that the yarn in fact was found to haVe dressing in the amount of 2.0 percent of the weight of the yarn.

NYRL 890070 is set forth in Attachment "A" to this document. Proposed HRL 957614 modifying NYRL 890070 is set forth in Attachment "B" to this document. Before taking this action, consideration will be given to any written comments timely received.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: April 14, 1995.

HUBBARD VOLENICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, NY, September 20, 1993.

CLA–2.54:S:N:N6:351 890070
Category: Classification
Tariff No. 5401.20.0000,
5402.31.6000, 5402.62.0000,
5509.22.0010 and 5509.53.0060

MS. BETTY Y. K. HENRICKSON
SUPERIOR THREADS & YARNS
P.O. Box 1213
Kamuela, HI 96743

Re: The tariff classification of two spun polyester yarns, a textured nylon yarn, a polyester filament yarn and a rayon sewing thread, from Korea.

DEAR MS. HENRICKSON:

In your letter dated September 1, 1993, you requested a classification ruling.

You have submitted five samples of yarns, as follows: (A)—silky smooth 65% polyester/35% cotton blend, (B)—super spun 100% polyester, (C)—super stretch 100% nylon, (D)—natural 100% viscose rayon, and (E)—high luster 100% polyester. Three other yarns listed in your letter, items (F) through (H)—were previously ruled on under our control number 890102 dated September 13, 1993.

The first item, (A), is a 3-ply spun yarn with a final Z-twist measuring either 84 or 135 metric number (nm). The second item, (B), is a 3-ply spun yarn measuring 84 run. The third item, (C), is a 2-ply textured yarn measuring 100 denier. Both the fourth and fifth samples, (D) and (E), are 2-ply filament yams measuring 120 denier. The five samples, A through E, put up on plastic cones or tubes have the following weights, including supports, as follows: 138.4 grams, 245.4 grams, 80.0 grams, 170.2 grams and 23.4 grams, respectively. According to our New York laboratory; the stretch nylon yam, (C), measures 236.8 decitex; the embroidery yarns marked (A), (B) and (E) are not dressed; and the 100% viscose rayon yarn marked, (D), is dressed. Two samples of this viscose rayon yarn, (B), were submitted to our office but only one was sent to our laboratory for analysis. Although they were made by different Korean manufacturers, we assume that both of these sewing threads are considered to be dressed.

The applicable subheading for the 65% polyester/35% cotton (A) yarns will be 5509.53.0060, Harmonized Tariff Schedule of the United States (HTS), which provides for yarn (other than sewing thread) of synthetic staple fibers, not put up for retail sale; other yarn, of polyester staple fibers; mixed mainly or solely with cotton; exceeding 52 nm. The duty rate will be 15 percent *ad valorem*.

The spun polyester yarn (B) will be classifiable under the provision for yarn (other than sewing thread) of synthetic staple fibers, not put up for retail sale; containing 85% or more

by weight of polyester staple fibers; multiple (folded) or cabled yarn; multiple (folded), with a final "Z" twist; in subheading 5509.22.0010, HIS. The rate of duty will be 12 percent *ad valorem*.

The stretch nylon yarn (C) will be classifiable under the provision for synthetic filament yarn (other than sewing thread), not put up for retail sale, * * *; textured yarn; of nylon or other polyamides, measuring per single yarn not more than 500 decitex; multiple (folded) or cabled yarn; in subheading 5402.31.6000, HTS. The rate of duty will be 9.1 percent *ad valorem*.

The viscose rayon yarn (D) will be classifiable under the provision for sewing thread of man-made filaments, whether or not put up for retail sale; of artificial filaments; in subheading 5401.20.0000, HTS. The rate of duty will be 13 percent *ad valorem*.

The high luster polyester yarn (E) will be classifiable under the provision for synthetic filament yarn (other than sewing thread), not put up for retail sale, * * *; other yarn, multiple (folded) or cabled; of polyesters; in subheading 5402.62.0000, HTS. The rate of duty will be 9.1 percent *ad valorem*.

The yarns designated as (A), (B), (C), (D)and (E) fall within textile category designations 607, 200, 600, 200, and 606, respectively. Based upon international textile trade agreements, products of Korea are subject to quota and the requirement of a visa.

The designated textile and apparel categories may be subdivided into parts. If so, visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes, to obtain the most current information available, we suggest that you check, close to the time of shipment, the *Status Report on Current Import (Restraint Levels)*, an internal issuance of the U.S. Customs Service, which is available for inspection at your local Customs office.

This ruling is being issued under the provisions of Section 177 of the Customs Regulations (19 C.F.R. 177).

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is imported. If the documents have been filed without a copy, this ruling should be brought to the attention of the Customs officer handling the transaction.

JEAN F. MAGUIRE,
Area Director,
New York Seaport.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC

CLA–2 CO:R:C:T 957614 CMR
Category: Classification
Tariff No. 5508.10.0000

MS. BETTY Y. K. HENRICKSON
SUPERIOR THREADS & YARNS
P.O. Box 1213
Kamuela, HI 96743

Re: Modification of New York Ruling Letter (NYRL) 890070 of September 20, 1993; classification of embroidery yarn.

DEAR MS. HENRICKSON:

On September 20, 1993, Customs issued New York ruling letter (NYRL) 890070 to you regarding the classification of various yarns. Information has come to the attention of this office that necessitates a modification of NYRL 890070 as it pertains to the classification of one yarn identified therein as item (B).

Facts:

Item (B) is described in NYRL 890070 as a super spun 100 percent polyester 3-ply yarn measuring 84 metric number. The ruling indicates the yarn had a final "Z" twist and was

put up on a plastic cone or tube. The yarn had a weight of 245.4 grams (including the support). The yarn was tested by the Customs New York laboratory which indicated that the yarn was not dressed. We have recently learned that the yarn in fact was found to have dressing in the amount of 2.0 percent of the weight of the yarn. As a result, a modification of NYRL 890070 is necessary to ensure uniformity in classification.

Issue:

Is the presence of 2.0 percent dressing material sufficient to consider a yarn dressed?

Law and Analysis:

In Headquarters Ruling Letter (HRL) 955524 of February 23, 1995, Customs classified yarns described as embroidery threads as sewing thread because it met the statutory definition of sewing thread set out in Note 5, Section XI, Harmonized Tariff Schedule of the United States (HTSUSA). Note 5 defines the term "sewing thread" as follows:

> For purposes of headings 5204, 5401 and 5508, the expression *"sewing thread"* means multiple (folded) or cabled yarn:
>
> (a) Put up on supports (for example, reels, tubes) of a weight (including support) not exceeding 1,000 g;
> (b) Dressed; and
> (c) With a final "Z" twist.

The yarns at issue in HRL 955524 were found by the Customs laboratory to be coated with from 1.2 to 3.1 percent by weight of silicone or paraffin wax. Customs stated in HRL 955524:

> In defining "finishing treatment", the EN's [Explanatory Notes] require only the presence of a coating substance. Thus, the yarns in question have been given a finishing treatment and are dressed according to this definition.

Item (B) in NYRL 890070 had a dressing of 2.0 percent by weight. Following our decision in HRL 955524, item (B) is considered "dressed" for classification purposes. As item (B) meets the statutory definition for sewing thread, it is so classified.

Holding:

Item (B) is classified as sewing thread of man-made staple fibers, whether or not put up for retail sale, of synthetic staple fibers, in subheading 5508.10.0000, HTSUSA, textile category 200, dutiable at 12.8 percent *ad valorem*. NYRL 890070 is modified in respect to the classification of item (B) identified above.

The designated textile and apparel category may be subdivided into parts. If so, the visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes, to obtain the most current information available, we suggest you check, close to the time of shipment, the *Status Report On Current Import Quotas (Restraint Levels)*, an internal issuance of the U.S. Customs Service which is updated weekly and is available for Inspection at your local Customs office.

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories, you should contact your local Customs office prior to importation of this merchandise to determine the current status of any import restraints or requirements.

JOHN DURANT,
Director,
Commercial Rulings Division.

PROPOSED MODIFICATION OF CUSTOMS RULING LETTER RELATING TO TARIFF CLASSIFICATION OF STEEL STRAPPING

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed modification of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 [19 U.S.C. 1625(c)(1)], as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify a ruling pertaining to the tariff classification of various types of steel strapping. Comments are invited on the correctness of the proposed ruling.

DATE: Comments must be received on or before June 2, 1995.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Commercial Rulings Division, 1301 Constitution Avenue, NW, (Franklin Court), Washington, DC 20229. Comments submitted may be inspected at the Commercial Rulings Division, Office of Regulations and Rulings, located at Franklin Court, 1099 14th Street, NW, Suite 4000, Washington, DC.

FOR FURTHER INFORMATION CONTACT: David W. Spence, Metals and Machinery Classification Branch, (202) 482–7030.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625(c)(1), Tariff Act of 1930 [19 U.S.C. 1625(c)(1)], as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify a ruling pertaining to the tariff classification of various types of steel strapping under the Harmonized Tariff Schedule of the United States (HTSUS).

In District Director Ruling Letter (DD) 897178, issued on May 17, 1994, by the District Director of Customs, New Orleans, Louisiana, zinc painted nonalloy steel strapping was held to be classifiable under subheading 7212.30.10, HTSUS, which provides for: [f]lat-rolled products of iron or nonalloy steel, of a width of less than 600 mm, clad, plated or coated: [o]therwise plated or coated with zinc: [o]f a width of less than 300 mm: [o]f a thickness exceeding 0.25 mm or more. Also in the ruling, black painted nonalloy steel strapping was held to be classifiable under subheading 7212.40.10, HTSUS, which provides for: [f]latrolled products of iron or nonalloy steel, of a width of less than 600 mm, clad, plated

or coated: [p]ainted, varnished or coated with plastics: [o]f a width of less than 300 mm.

It is now our understanding, based upon the original information submitted by the importer, that DD 897178 was incomplete and incorrect with regard to the classification of the zinc painted steel strapping.

Customs intends to modify DD 897178 to reflect the proper classification of the various types of steel strapping in the proper provisions under headings 7211, 7212, and 7217, HTSUS, as discussed in proposed HQ 957492.

Before taking this action, consideration will be given to any written comments timely received. DD 897178 is set forth in Attachment A to this document; and proposed HQ 957492, modifying DD 897178, is set forth in Attachment B to this document.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: April 13, 1995.

MARVIN M. AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New Orleans, LA, May 17, 1994.

CLA–2–29–NO:CO:FNIS:C22 897178
Category: Classification
Tariff No 7212.30.1030 and 7212.40.1000

R.W. SMITH & CO., INC.
P.O. Box 60587 AMF
Houston, TX 77205–0587

Re: The tariff classification of steel strapping.

DEAR MR. GARCIA:

The following ruling is being issued to you on behalf of your client and importer; Burseryds Bruk AB. This classification decision under the Harmonized Tariff Schedule of the United States (HTS) is being issued in accordance with the provisions of Section 177 of the Customs Regulations (19 C.F.R. 177).

DATE OF INQUIRY:	April 19, 1994.
DESCRIPTION OF MERCHANDISE:	Nonalloy steel strapping in coils, coated or plated with black zinc or black paint.
HTS PROVISIONS:	Flat-rolled products of iron or nonalloy steel, of a width of less than 600mm, clad, plated or coated: Otherwise plated or coated with zinc: Of a width of less than 300mm: Of a thickness exceeding 0.25mm or more: Of a width less than 51mm in coils.

HTS SUBHEADING:	7212.30.1030.
RATE OF DUTY:	3.4% *ad valorem*.
HTS SUBHEADING:	Flat-rolled products of iron or nonalloy steel, of a width of less than 600mm, clad, plated or coated: Painted, varnished or coated with plastics: Of a width of less than 300mm.
HTS SUBHEADING:	7212.40.1000.
RATE OF DUTY:	3.4% *ad valorem*.

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is imported. If the documents have been filed without a copy, this ruling should be brought to the attention of the Customs officer handling the transaction.

LESLIE DILLMANN,
(for Joanne C. Cornelison,
District Director.)

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC

CLA-2 R:C:M 957492 DWS
Category: Classification
Tariff No. 7211.30.10,
7211.41.30, 7211.90.00, 7212.30.10,
7212.40.10, 7217.11.20 and 7217.19.50

MR. ROBERT GARCIA
R.W. SMITH & CO., INC.
P.O. Box 60587 AME
Houston, TX 77205–0587

Re: Reconsideration of DD 897178; ribbon wound and oscillated wound nonalloy steel strapping; Chapter 72, Notes 1(k) and (o); HQ 089538; NY 845896; *The Making, Shaping and Treating of Steel;* General Explanatory Note (IV)(C)(2)(d)(ii) to Chapter 72.

DEAR MR. GARCIA:

This is in reference to DD 897178, issued to you on May 17, 1994, on behalf of Burseryds Bruk AB, by the District Director of Customs, New Orleans, Louisiana, concerning the classification of steel strapping under the Harmonized Tariff Schedule of the United States (HTSUS). In reviewing DD 897178, we found that the holding therein was incomplete based upon the description of the merchandise you provided to Customs on April 19, 1994.

Facts:

The merchandise consists of various types of steel strapping, which are cold-rolled and made of two grades of carbon or nonalloy steel. One grade contains by weight 0.06 percent to .11 percent of carbon, and the other grade contains by weight .11 percent to 0.18 percent of carbon. The strapping ranges in size from 19 mm × 0.50 mm to 32 mm × 1 mm. It is in either ribbon wound coils, which consist of successively superimposed layers, or oscillated wound coils, which consist of layers wound back and forth across a spool. The strapping is available in the following finishes: bright finished, waxed, blue-annealed, black painted, green painted, zinc painted, and hot-dip galvanized. It is our understanding that bright finished products may be of high-strength steel. Zinc painted products are painted with an organic paint containing metallic zinc dust.

The subheadings under consideration are as follows:

7211.30.10:	[f]lat-rolled products of iron or nonalloy steel, of a width of less than 600 mm, not clad, plated or coated: [n]ot further worked than cold-rolled (cold-reduced), of high-strength steel: [o]f a width of less than 300 mm: [o]f a thickness exceeding 0.25 mm.

The general, column one rate of duty for goods classifiable under this provision is 3.1 percent *ad valorem*.

7211.41.30: * * *: [o]ther, not further worked than cold-rolled (cold-reduced) : [c]ontaining by weight less than 0.25 percent of carbon: [o]f a width of less than 300 mm: [o]f a thickness exceeding 0.25 mm but not exceeding 1.25 mm.

The general, column one rate of duty for goods classifiable under this provision is 3.1 percent *ad valorem*.

7211.90.00: * * *: [o]ther.

The general, column one rate of duty for goods classifiable under this provision is 4.6 percent *ad valorem*.

7212.30.10: [f]lat-rolled products of iron or nonalloy steel, of a width of less than 600 mm, clad, plated or coated: [o]therwise plated or coated with zinc: [o]f a width of less than 300 mm: [o]f a thickness exceeding 0.25 mm or more.

The general, column one rate of duty for goods classifiable under this provision is 3.1 percent *ad valorem*.

7212.40.10 [p]ainted, varnished or coated with plastics: [o]f a width of less than 300 mm.

The general, column one rate of duty for goods classifiable under this provision is 3.1 percent *ad valorem*.

7217.11.20: [w]ire of iron or nonalloy steel: [c]ontaining by weight less than 0.25 percent of carbon: [n]ot plated or coated, whether or not polished: [f]lat wire: [o]f a thickness exceeding 0.25 mm put not exceeding 1.25 mm.

The general, column one rate of duty for goods classifiable under this provision is 2.9 percent *ad valorem*.

7217.19.50: * * *: [o]ther: [o]ther.

The general, column one rate of duty for goods classifiable under this provision is 4.8 percent *ad valorem*.

Issue:

Whether the various types of steel strapping are classifiable under subheading 7211.30.10, HTSUS, as flat-rolled products of nonalloy steel, not further worked than cold-rolled, of high-strength steel, not coated, of a width less than 300 mm and a thickness exceeding .25 mm; under subheading 7211.41.30, HTSUS, as flat-rolled products of nonalloy steel, not further worked than cold-rolled, not coated, containing by weight less than 0.25 percent of carbon, of a width of less than 300 mm and a thickness exceeding 0.25 mm but not exceeding 1.25 mm; under subheading 7211.90.00, HTSUS, as other flat-rolled products of nonalloy steel, not further worked than cold-rolled, of a width of less than 600 mm, not coated; under subheading 7212.30.10, HTSUS, as flat-rolled products of nonalloy steel, coated, with zinc, of a width of less than 300 mm and a thickness exceeding 0.25 mm or more; under subheading 7212.40.10, as flat-rolled products of nonalloy steel, of a width of less than 300 mm, painted with plastics; under subheading 7217.11.20, HTSUS, as flat wire of nonalloy steel, containing by weight less than 0.25 percent of carbon, not coated, of a thickness exceeding 0.25 mm but not exceeding 1.25 mm; or under subheading 7217.19.50, HTSUS, as other wire of nonalloy steel, containing by weight less than 0.25 percent of carbon.

Law and Analysis:

Classification of merchandise under the HTSUS is in accordance with the General Rules of Interpretation (GRI's). GRI 1 provides that classification is determined according to the terms of the headings and any relative section or chapter notes.

In DD 897178, it was held that zinc painted steel strapping was classifiable under subheading 7212.30.10, HTSUS, and black painted steel strapping was classifiable under subheading 7212.40.10, HTSUS. It is now our understanding, based upon the original information you submitted, that DD 897178 was incomplete and incorrect with regard to the classification of the zinc painted steel strapping. Our classification analysis of all the merchandise follows.

BRIGHT FINISHED RIBBON WOUND STRAPPING

In part, Chapter 72, note 1(k), HTSUS, states:

1. In this chapter and, in the case of notes (d), (e) and (f) below throughout the tariff schedule, the following expressions have the meanings hereby assigned to them:

(a)–(ij) xxx

(k) *Flat-rolled products*

Rolled products of solid rectangular (other than square) cross section, which do not conform to the definition at (ij) above in the form of:

—coils of successively superimposed layers, * * *

Chapter 72, Additional U.S. Note 1(a), HTSUS, states:

1. For the purposes of the tariff schedule the following expressions have the meanings hereby assigned to them:

(a) *High-strength steel*

Flat-rolled products of a thickness of less than 3 mm and having a minimum yield point of 275 Mpa or of a thickness of 3 mm or more and having a minimum Yield point of 355 Mpa.

A bright finish on the steel is created at the end of the of the cold reduction process, when an unpolished finish is applied to the steel through cold-rolling, annealing, and descaling. The application of the bright finish does not affect the classification of the steel strapping. *See* HQ 089538, dated August 7, 1991.

The bright finished ribbon wound steel strapping meets the a definition of flat-rolled products in that it is of solid rectangular cross section and is in the form of coils of successively superimposed layers. Therefore, the steel strapping is classifiable under either subheading 7211.30.10, HTSUS, or subheading 7211.41.30, HTSUS, depending upon whether it is of high-strength steel.

BLACK PAINTED, GREEN PAINTED, AND ZINC PAINTED RIBBON WOUND STEEL STRAPPING

With regard to the zinc painted steel strapping, it is our position that the zinc paint does not constitute a metal coating. *The Making, Shaping and Treating of Steel* (10th Edition), delineates between metallic protective coatings and organic coatings. Metallic protective coatings are applied to steel by the following methods: hot-dip process, metal spraying, metal cementation, metal cladding, fusion welding of coatings, electroplating, cathode sputtering, and evaporation of condensation. Whereas, organic coatings are commonly known as paints, varnishes, enamels, and lacquers. Paints are described as mixtures of pigments with drying oils, with varnish vehicles or with synthetic resins or polymers. Because the subject zinc paint consists of organic paint containing metallic zinc dust, it is a paint rather than a metal coating.

Consequently, the black painted, green painted, and zinc painted ribbon wound steel strapping is classifiable under subheading 7212.40.10, HTSUS.

ZINC HOT-DIP GALVANIZED RIBBON WOUND STEEL STRAPPING

As stated above, a zinc hot-dip galvanized coating is a metallic coating. Therefore, the zinc hot-dip galvanized ribbon wound steel strapping is classifiable under subheading 7212.30.10, HTSUS.

BLUE-ANNEALED RIBBON WOUND STEEL STRAPPING

In understanding the language of the HTSUS, the Harmonized Commodity Description and Coding System Explanatory Notes may be utilized. The Explanatory Notes, although not dispositive or legally binding, provide a commentary on the scope of each heading of the HTSUS, and are generally indicative of the proper interpretation of these headings. *See* T.D. 89–50, 54 Fed. Reg. 35127, 35128 (August 23, 1989). In part, General Explanatory Note (IV)(C)(2)(d)(11) to chapter 72, HTSUS (pp. 981–982), states:

(IV) **Production of finished products**

(A)–(B) xxx

(C) **Subsequent manufacture and finishing**

The finished products may be subjected to further finishing treatments or converted into other articles by a series of operations such as:

(1) xxx

(2) Surface treatments or other operations, including cladding, to improve the properties or appearance of the metal, protect ii against rusting and cor-

rosion, etc. Except as otherwise provided in the text of certain headings, such treatments do not affect the heading in which the goods are classified. They include:

(d) Surface finishing treatment, including:

(I) xxx

(ii) * * * blueing (blue annealing) * * *

Because the process of blue-annealing the steel strapping is considered a surface finishing treatment, because the steel strapping is "further worked", the blue-annealed ribbon wound steel strapping is classifiable under subheading 7211.90.00, HTSUS. *See* NY 845896, dated October 27, 1989.

BLUE-ANNEALED OSCILLATED WOUND STEEL STRAPPING

Chapter 72, note 1(o), HTSUS, states:

1. In this chapter and, in the case of notes (d), (e) and (f) below throughout the tariff schedule, the following expressions have the meanings hereby assigned to them:

(a)–(n) xxx

(o) *Wire*

Cold-formed products in coils, of any uniform solid cross sectIon along their whole length, which do not conform to the definition of flat-rolled products.

It is our position that oscillated wound steel strapping is, for classification purposes, described as wire as it does not meet the definition of flat-rolled products under chapter 72, note 1(k), HTSUS. It consists of layers of material wound back and forth across a spool, as opposed to being wound in successively superimposed layers.

Therefore, because the blue-annealed oscillated wound steel strapping is not coated, it is classifiable under subheading 7217.11.20, HTSUS.

BLACK PAINTED, GREEN PAINTED, AND ZINC PAINTED OSCILLATED WOUND STEEL STRAPPING

Because they are coated products, the black painted, green painted, and zinc painted oscillated wound steel strapping is classifiable under subheading 7217.19.50, HTSUS.

Holding:

The bright finished ribbon wound steel strapping, of high-strength steel, is classifiable under subheading 7211.30.10, HTSUS, as flat-rolled products of nonalloy steel, not further worked than cold-rolled, of high-strength steel, not coated, of a width less than 300 mm and a thickness exceeding 0.25 mm.

The bright finished ribbon wound steel strapping, not of high-strength steel, is classifiable under subheading 7211.41.30, HTSUS, as flat-rolled products of nonalloy steel, not further worked than cold-rolled, not coated, containing by weight less than 0.25 percent of carbon, of a width of less than 300 mm and a thickness exceeding 0.25 mm but not exceeding 1.25 mm.

The black painted, green painted, and zinc painted ribbon wound steel strapping is classifiable under subheading 7212.40.10, as flat-rolled products of nonalloy steel, of a width of less than 300 mm, painted with plastics.

The zinc hot-dip galvanized ribbon wound steel strapping is classifiable under subheading 7212.30.10, HTSUS, as flat-rolled products of nonalloy steel, coated with zinc, of a width of less than 300 mm and a thickness exceeding 0.25 mm or more.

The blue-annealed ribbon wound steel strapping is classifiable under subheading 7211.90.00, HTSUS, as other flat-rolled products of nonalloy steel, not further worked than cold-rolled, of a width of less than 600 mm, not coated.

The blue-annealed oscillated wound steel strapping is classifiable under subheading 7217.11.20, HTSUS, as flat wire of nonalloy steel, containing by weight less than 0.25 percent of carbon, not coated, of a thickness exceeding 0.25 mm but not exceeding 1.25 mm.

The black painted, green painted, and zinc painted oscillated steel strapping is classifiable under subheading 7217.19.50, HTSUS, as other wire of nonalloy steel, containing by weight less than .25 percent of carbon.

Effect on Other Rulings:

DD 897178 is modified to reflect the reasoning in this ruling.

JOHN DURANT,
Director,
Commercial Rulings Division.

MODIFICATION OF RULING LETTER RELATING TO CLASSIFICATION OF EMBROIDERY IN THE PIECE

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of modification of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is modifying a ruling pertaining to the tariff classification of certain embroidery in the piece, identified as style E–7734. Notice of the proposed modification was published March 8, 1995 in the CUSTOMS BULLETIN.

EFFECTIVE DATE: Merchandise entered or withdrawn from warehouse for consumption on or after July 3, 1995.

FOR FURTHER INFORMATION CONTACT: Cynthia Reese, Textile Classification Branch, (202–482–7094).

SUPPLEMENTARY INFORMATION:

BACKGROUND

On March 8, 1995, Customs published a notice in the CUSTOMS BULLETIN, Volume 29, Number 10, proposing to modify DD 800498, dated August 24, 1994, which classified an embroidered scalloped fabric strip, style E–7734, as an embroidered motif in subheading 5810.92.0040, Harmonized Tariff Schedule of the United States Annotated (HTSUSA). Based upon the fact that the fabric strip was fabric in the piece which had been embroidered, Customs proposed to modify DD 800498 to reflect proper classification of style E–7734 as embroidery in the piece in subheading 5810.92.9050, HTSUSA. No comments were received in response to this notice.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is modifying DD 800498. Headquarters Ruling Letter 957277 modifying DD 800498 is set forth in the Attachment to this document.

Publication of rulings or decisions pursuant to section 625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulation (19 CFR 177.10(c)(1)).

Dated: April 11, 1995.

HUBBARD VOLENICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, April 11, 1995.

CLA-2 CO:R:C:T 957277 CMR
Category: Classification
Tariff No. 5810.92.9080

MR. RON SHEPPARD
GALAXY ENTERPRISES, INC.
2421 Crofton Lane, Unit 14
Crofton, MD 21114

Re: Modification of DD 800498 of August 24, 1994; classification of embroidered fabric in the piece; 5810.92.10, HTSUSA, v. 5810.92.90; HTSUSA.

DEAR MR. SHEPPARD:

This ruling is a modification of DD 800498 of August 24, 1994. In that ruling, Customs classified two products, styles E–7733 and E–7734, as embroidered motifs in subheading 5810.92.0040, Harmonized Tariff Schedule of the United States Annotated (HTSUSA). The ruling indicated the rate of duty as 8.4 percent *ad valorem*.

Customs has reviewed the decision in DD 800498 and determined that we erred in the classification of style E–7734. Therefore, we are issuing this modification to correct that error. Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993) (hereinafter section 625(c)(1)), notice of the proposed modification of DD 800498 was published March 8, 1995 in the CUSTOMS BULLETIN, Volume 29, Number 10.

Facts:

Style E–7734 is an embroidered scalloped fabric strip that is imported in material lengths. The submitted sample has ragged edges indicating it has been cut from a larger piece. The item is created by embroidering woven rayon fabric with embroidery threads and sewing sequins and beads onto the rayon ground fabric. The embroidery, sequins and beads create a pattern which is continuously repeated along the fabric with no discernable break and then repetition of the pattern. In other words, this is fabric in the piece which has been embroidered.

Issue:

Was style E–7734 properly classified as an embroidered motif in DD 800498 or is it classified as embroidery in the piece?

Law and Analysis:

Classification of goods under the HTSUSA is governed by the General Rules of Interpretation (GRIs). GRI 1 provides that "classification shall be determined according to the terms of the headings and any relative section or chapter notes and, provided such headings or notes do not otherwise require, according to [the remaining GRIs taken in order]."

Heading 5810, HTSUSA, provides for "embroidery in the piece, in strips or in motifs". The Explanatory Notes to the *Harmonized Commodity Description and Coding System*, the official interpretation of the tariff at the international level, offers guidance in discerning the forms of embroidery classified in heading 5810, HTSUSA. The Explanatory Notes state in regard to heading 5810, in pertinent part, the following:

> All varieties of embroidery described remain within this heading when in the following forms:
>
> (1) **In the piece or in strips or various widths.** These pieces or strips may bear a series of identical designs, whether or not intended for subsequent separation to be made up into finished articles (e.g., strips of embroidered labels for marking articles of apparel, or pieces embroidered at regular intervals intended to be cut up and made up into bibs).
>
> (2) **In the form of motifs,** i.e., individual pieces of embroidered design serving no other function than to be incorporated or appliqued as elements of embroidery in, for example, underwear or articles of apparel or furnishings. They may be cut to any shape, backed or otherwise assembled. They include badges, emblems, "flashes", initials, numbers, stars, national or sporting insignia, etc.

It is clear from the descriptions in the Explanatory Notes that embroidery in the form of motifs means individual pieces or items of embroidery, not embroidery in continuous lengths with no separation or clearly identifiable separate units of embroidery.

As style E–7734 is an embroidered scalloped fabric strip that is imported in material lengths, it is not classifiable as a motif. Reference to it as a motif in DD 800498 was an error as was its classification as a motif in subheading 5810.92.0040, HTSUSA.

Holding:

Style E–7734 is properly classified as embroidery in the piece, of man-made fibers, other, other, in subheading 5810.92.9080, HTSUSA. Goods classifiable in this provision fall within textile category 229 and are dutiable according to the terms of U.S. Additional Note 3, Chapter 58. That note states that the rate of duty applicable to goods classified in subheading 5810.92.90, HTSUSA, and subject to duty at the general rate (most favored nation) is 8.3 percent, "but in the case of embroidery in the piece not less than the rate which would apply to such product if not embroidered", i.e., not less than the rate applicable to the ground fabric.

The ground fabric for style E–7734 is woven rayon, thus, style E–7734 is dutiable at 16.8 percent *ad valorem*. This is the rate of duty for woven fabrics of artificial filament yarn classified in subheading 5408.21.0030, HTSUSA, which is where the woven rayon ground fabric would be classified if not embroidered.

DD 800498 of August 24, 1994, is hereby modified to reflect classification of style E–7734 as stated above. In accordance with section 625(c)(1), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to section 625(c)(1) does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

The designated textile and apparel category may be subdivided into parts. If so, the visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes, to obtain the most current information available, we suggest you check, close to the time of shipment, the *Status Report On Current Import Quotas (Restraint Levels)*, an internal issuance of the U.S. Customs Service which is updated weekly and is available for inspection at your local Customs office.

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories, you should contact your local Customs office prior to importation of this merchandise to determine the current status of any import restraints or requirements.

HUBBARD VOLENICK,
(for John Durant, Director,
Commercial Rulings Division.)

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Dominick L. DiCarlo

Judges

Gregory W. Carman
Jane A. Restani
Thomas J. Aquilino, Jr.
Nicholas Tsoucalas
R. Kenton Musgrave
Richard W. Goldberg

Senior Judges

James L. Watson

Herbert N. Maletz

Bernard Newman

Samuel M. Rosenstein

Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 95–60)

INNER SECRETS/SECRETLY YOURS, INC., PLAINTIFF *v.* UNITED STATES, ET AL., DEFENDANTS

Court No. 95–01–00044

Plaintiff, Inner Secrets/Secretly Yours, Inc., challenges the United States Customs Service's ("Customs") classification of its merchandise, women's woven cotton boxer-style shorts, imported in entry numbers 523–0246820–3, 523–0249962–0 and 523–0246885–6, as outerwear shorts pursuant to HTSUS 6204.62.4055, subject to textile category 348.

Held: Plaintiff has overcome the presumption of correctness which attaches to Customs' classifications. The subject boxer-style garments are entitled to enter the United States under 6208.91.3010, HTSUS, subject to visa quota category 352.

[Judgment for plaintiff; case dismissed.]

(Dated April 10, 1995)

Ross & Hardies (Steven P. Kersner, Roger Banks, Evelyn Suarez and *Stephen M. DeLuca)* for plaintiff.

Grunfeld, Desiderio, Lebowitz & Silverman (Steven P. Florsheim), Jacalyn E.S. Bennett & Company, *amicus curiae* in support of plaintiff.

Frank W. Hunger, Assistant Attorney General; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice *(Barbara Silver Williams);* of counsel: *Karen P. Binder,* General Attorney, Office of Assistant Chief Counsel, International Trade Litigation, United States Customs Service, for defendants.

OPINION

TSOUCALAS, *Judge:* This action comes before the Court after trial *de novo* on March 1, 1995. Plaintiff, Inner Secrets/Secretly Yours, Inc. ("Inner Secrets" or "Secretly Yours"), challenges the United States Customs Service's ("Customs") classification of plaintiff's merchandise in entry numbers 523–0246820–3, 523–0249962–0 and 523–0246885–6.

This case concerns women's woven cotton boxer-style shorts ("boxers"). The heart of the dispute is whether the subject garments are properly classifiable as "outerwear" under subheading 6204.62.4055 of the Harmonized Tariff Schedule of the United States ("HTSUS"), visa quota category 348, or as "underwear," 6208.91.3010,[1] HTSUS, visa quota category 352.

[1] In its complaint, Secretly Yours sought classification under HTSUS 6208.91.2010. Complaint ¶ 24. However, it sought relief under HTSUS 6208.91.3010. Complaint at 8.

Plaintiff is an importer of women's undergarments from Hong Kong. *Amicus curiae* in support of plaintiff in this action is Jacalyn E.S. Bennett & Company ("Amicus"). Amicus is an importer of various ladies underwear garments.

The Court has jurisdiction pursuant to 28 U.S.C. § 1581(a) (1988).

BACKGROUND

The boxers at issue entered the United States via several importations. Plaintiff's first two importations, entry numbers 523–0243288–6 and 523–0243683–8, consisting of 2,000 dozen boxer-style garments, entered the United States in July 1994 under a 352 visa as women's knitted cotton briefs and panties, 6108.21.00, HTSUS, at 8.1% *ad valorem*. Complaint ¶ 5; Answer ¶¶ 5, 8; *Memorandum in Support of Defendants' Opposition to Plaintiff's Application for Preliminary Injunction ("Defendants' Opposition to Preliminary Injunction")* at 1.

Team 256 of John F. Kennedy Airport Customs ("JFK Customs") handles Hong Kong-origin knitted apparel. Shelley Thalrose, Team 256 Field National Import Specialist ("Field National Import Specialist"), examined samples from both entries. Concluding that the garments were manufactured of woven fabric, she transferred the merchandise to Team 258 which handles woven apparel. Subsequently, Team 258 determined that the garments were women's outerwear shorts, 6204.62.4055, HTSUS, subject to textile category 348. Team 258 detained the merchandise. *Defendants' Opposition to Preliminary Injunction* at 2.

By affidavit, Field National Import Specialist Shelley Thalrose declared that she informed plaintiff that, in her opinion and in Team 258's opinion, the subject boxers were classifiable as outerwear shorts. In addition, she stated that she told plaintiff that the first entry would be released "conditionally," pending a review by the National Import Specialist ("NIS"), but that if NIS confirmed an outerwear shorts classification, Customs would issue Notices to Redeliver for failure to present the proper visa. Plaintiff's Trial Exhibit 28, Affidavit of Shelley Thalrose ¶¶ 8, 9. The date of release of plaintiff's first two entries was August 3, 1994. Answer ¶ 8.

Subsequently NIS concurred that plaintiff's garments were classifiable as women's outerwear shorts, 6204.62.4055, HTSUS. As plaintiff's first two entries had not been liquidated, on September 9, 1994, Customs issued Notices to Redeliver. *Id.* at ¶ 11.

Plaintiff had additional importations of the subject merchandise which also entered under a 352 visa. On September 9, 1994, Customs demanded redelivery of plaintiff's entries 523–0243288–6 and 523–0243683. *Id.* On September 12, 1994, Customs rejected plaintiff's entry numbers 523–0247376–5[2] and 523–0246820–3 for failure to present the proper visa. Customs also demanded redelivery of plaintiff's entry number 523–0246885–6 on September 13, 1994. *Id.*

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[2] This entry was later designated warehouse entry number 523–0249962–0.

On September 29th, plaintiff filed an internal advice request with Customs to resolve the classification question. On October 11, 1994, Customs Headquarters responded by issuing a Headquarters Ruling Letter ("HRL") 957068. Complaint and Answer ¶ 15. The ruling was adverse to plaintiff.

HRL 957068:

HRL 957068 noted that another ruling, HRL 087940, dated September 16, 1991, provided seven criteria for distinguishing men's boxer shorts from non-underwear garments. These criteria are:

1. Fabric weight greater than 4.2 ounces per square yard;
2. An enclosed or turned over waistband;
3. Lack of a fly or lining;
4. A single leg opening greater than the relaxed waist;
5. The presence of belt loops, inner or outer pockets or pouches;
6. Multiple snaps at the fly opening (not including the waistband), or button or zipper fly closures.
7. The side length of a size medium should not exceed 17 inches.

Memorandum of Law in Support of Plaintiff's Motion for Preliminary Injunction ("Plaintiff's Motion for Preliminary Injunction"), Exhibit F at 3–4. According to Customs, no one feature is determinative and the presence of more than one of the above features gives rise to a rebuttable presumption that the garment under evaluation is not underwear. *Id.* at 4.

Customs' HRL 957068 noted that, although a June 25, 1992 ruling, HRL 951754,[3] had utilized the criteria set forth in HRL 087940 to determine the classification of 100% cotton flannel women's boxer-style shorts in a sleepwear versus outerwear classification question, HRL 951754 had erred because the criteria applied only to men's boxer-style garments. *Id.* Nevertheless, Customs evaluated the subject boxers according to the seven criteria because plaintiff had claimed to have detrimentally relied on HRL 951754. *Id.* Customs found that plaintiff's merchandise satisfied two of the seven criteria, i.e., they had a single leg opening greater than the relaxed waist and they lacked a fly. *Id.*

With respect to the "fly" criterion, Customs stated:

> The garment has a mock fly which, in essence, means it has no fly. The fly is not functional as it has been sewn at two points apparently in order to help the fabric lie flat. While women may have no need for a fly; the lack of a fly is one of the listed criteria.

Id. at 5.

HRL 957068 also emphasized that HRL 951754 would be modified to reflect the view that it was error to apply the criteria of HRL 087940 to women's garments. *Id.* at 4.

[3] Plaintiff's Trial Exhibit 24.

Having found that plaintiff's merchandise met two of the seven criteria, Customs concluded that the garments were presumptively outerwear shorts. Consequently, Customs found no basis for plaintiff's detrimental reliance claim. *Id.* at 5. In an assertive move, Customs rejected HRL 087940's application to women's boxer shorts for classification determinations. *Id.* Customs then proceeded to evaluate the subject merchandise anew based on tariff terms, basic tenets of classification, and consideration of: judicial precedent; marketing and advertising information; the fact that the name of the garments identified them as "shorts"; the garment's physical characteristics, i.e., its fabric, design and construction (e.g., its bulkiness and looseness of fit); and information on fashion trends indicating that women, especially young women in plaintiff's targeted age group, principally wear boxer shorts as shorts to be seen, i.e., as outerwear. *Id.* 5–15.

Upon re-evaluation, Customs found that the subject boxers were properly classifiable as outerwear shorts, 6204.62.4055, HTSUS, subject to textile category 348, dutiable at 17.7% *ad valorem*. *Id.* at 15.

Plaintiff disagreed with Customs' ruling and applied to this Court for a preliminary injunction on October 14, 1994. The Court dismissed that action for lack of subject matter jurisdiction because of plaintiff's failure to exhaust administrative remedies. *See Inner Secrets/Secretly Yours, Inc. v. United States*, 18 CIT ____, Slip Op. 94–171 (November 7, 1994).

On November 10, 1994, pursuant to 19 U.S.C. §§ 1514, 1515 (1988 & Supp. V 1993), plaintiff filed timely protests of entry numbers 523–0249962–0, 523–0246885–6 and 523–0246820–3 with Customs. Plaintiff's protests were denied. *Defendant's Pretrial Memorandum of Law ("Defendant's Memorandum")* at 4.

Having exhausted administrative remedies, on January 13, 1995, plaintiff again applied to this Court for injunctive relief. On February 6, 1995, a full hearing was held to determine whether a preliminary injunction should issue. At culmination of oral argument, the Court ruled from the bench, finding that plaintiff had failed to satisfy the requisite criteria for injunctive relief.[4] Accordingly, the Court denied plaintiff's motion for a preliminary injunction but scheduled an expedited trial on the merits. Trial was held on March 1, 1995.

DISCUSSION

The central issue in this case concerns the proper tariff classification of certain women's woven cotton boxer-style shorts imported from Hong Kong by plaintiff. The boxers are manufactured of flannel fabric, in a plaid pattern, and have a weight of less than 4.2 ounces per square yard. They have a waistband which is not enclosed or turned over; a side length, of a size medium, not in excess of 17 inches; and two small nonfunctional buttons on the waistband above the fly. Two seams have been sewn horizontally across the fly, dividing the fly opening into thirds. The

[4] The Court issued *Inner Secrets/Secretly Yours, Inc.*, 19 CIT ___, Slip. Op. 95–22 (February 14, 1995), in accordance with its bench ruling.

boxers do not have belt loops, inner or outer pockets or pouches, multiple snaps at the fly opening, or button or zipper fly closures.

The subject boxers are marketed under the label "No Excuses."[5]

The HTSUS Classifications in Dispute:

The pertinent portion of the HTSUS propounded by plaintiff states:

6208	Women's or girl's singlets and other undershirts, slips, petticoats, *briefs, panties,* nightdresses, pajamas, negligees, bathrobes, dressing gowns *and similar articles:*	
	Other:	
6208.91	Of cotton:	
6208.91.30	Other	11.9%
6208.91.3010	Women's	(352)

Harmonized Tariff Schedule of the United States (Supp. I 1994) (emphasis added).

The pertinent portion of the HTSUS which the defendant believes is applicable states:

6204	Women's or girl's suits, ensembles, suit-type jackets and blazers, dresses, skirts, divided skirts, trousers, bib and brace overalls, breeches and *shorts* * * *:	
	Trousers, bib and brace overalls, breeches and shorts:	
6204.62	Of Cotton:	
	Other	
* * * * * * *		
6204.62.40	Other	17.7%
	Shorts:	
6204.62.4055	Women's	(348)

Id. (Emphasis added.)

Plaintiff claims that Customs' assigned classification is not supported by substantial evidence. *Plaintiff's Amended Pretrial Statement* at Count II. According to plaintiff, HRL 951754 extended the seven criteria of HRL 087940 to women's garments. *Id.* Plaintiff argues that the subject garments satisfy the sole criterion of having a single leg opening greater than the relaxed waist and are, therefore, presumptively underwear. *Plaintiff's Amended Pretrial Statement* at Count II; *Plaintiff's Motion for Preliminary Injunction* at 20.

In support of its preferred classification, plaintiff relies on various cases which set forth factors the courts have considered important in classification decisions. *Id.* Plaintiff argues that Customs' HRL 957068 is contrary to controlling judicial precedent. Plaintiff also points out that Canadian Customs, which uses the same tariff nomenclature as that of the United States, has classified identical merchandise as under-

[5] Plaintiff also imports, under the "No Excuses" label, a string bikini panty and underwire brassiere of plaid woven cotton flannel fabric which is identical to that of the subject boxers.

wear. *Plaintiff's Motion for Preliminary Injunction* at 24 n.9; Exhibit H: Canadian Ruling Letter (July 6, 1994) (sleep shorts with a fly front opening, with or without buttons, classifiable as underwear under 6108.91 to 6208.99, HTSUS).

In plaintiff's support, Amicus argues that, even if the subject boxers are not briefs or panties, they are "similar articles" by application of the rule of *ejusdem generis,* meaning "of the same kind," as that principle is set forth in *Sports Graphics, Inc. v. United States,* 24 F.3d 1390, 1392 (Fed. Cir. 1994). *Pre-Trial Memorandum of Amicus Curiae, Jacalyn E.S. Bennett & Company ("Amicus Memorandum")* at 11–12.

Amicus also argues that the subject boxers' flannel fabric has no bearing on their classification. For support, Amicus relies on *Hampco Apparel, Inc. v. United States,* 12 CIT 92, 95 (1988), where the Court dismissed the government's argument that twill fabric indicated a "shorts" classification because the fabric was heavier than normal swimwear fabric. In that case, the Court found that the twill fabric was a design and fashion factor and was the current "in" fabric for swimwear. *Amicus Memorandum* at 14–15. Amicus, claims that flannel is, increasingly, an "in" fabric, especially for winter garments. *Id.* at 15.

Lastly, citing *St. Eve Int'l, Inc. v. United States,* 11 CIT 224, 225 (1987), Amicus argues that the color and print of the subject boxers also have no bearing on classification. *Amicus Memorandum* at 15.

Customs disputes plaintiff's claim that the assigned classification is not sufficiently supported by evidence. Specifically, Customs first reiterates its finding that the subject boxers meet two of HRL 087940's criteria. *Id.* at 13. Second, Customs argues that the subject boxers do not fall under the HTSUS 6208 general terms "briefs, panties * * * and similar articles" since they do not possess the essential characteristics or purposes that unite the articles *eo nomine,* i.e., under that name. *Id.* Customs believes that the boxers at issue are principally used as outerwear.

It is also plaintiff's position that Customs has violated Section 623 of the Customs Modernization Act,[6] as amended, 19 U.S.C. § 1625(c)(1) and (2) (1988 & Supp. V 1993).[7]

Specifically, plaintiff zealously argues that Customs modified prior rulings by either ignoring the seven criteria set forth in HRL 087940 and

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[6] On December 8, 1993, the President signed into law the North American Free Trade Agreement Implementation Act ("the Act"). *See* North American Free Trade Implementation Act, Pub. L. No. 103–182, 107 Stat. 2186 (1993). Title VI of the Act, popularly known as the "Customs Modernization Act" (the "Mod Act"), amended numerous Customs laws. In particular, section 623 of the Mod Act amended section 1625 of the Tariff Act of 1930, 19 U.S.C. § 1625 (1988), which pertains to publication of Customs decisions.

[7] **§ 1625 Interpretive rulings and decisions; public information.**

* * * * * * *

(c) Modification and revocation

A proposed interpretive ruling or decision which would—

(1) modify (other than to correct a clerical error) or revoke a prior interpretive ruling or decision which has been in effect for at least 60 days; or

(2) have the effect of modifying the treatment previously accorded by the Customs Service to substantially identical transactions;

shall be published in the Customs Bulletin. The Secretary shall give interested parties an opportunity to submit, during not less than the 30-day period after the date of such publication, comments on the correctness of the proposed ruling or decision. After consideration of any comments received, the Secretary shall publish a final ruling or decision in the Customs Bulletin within 30 days after the closing of the comment period. The final ruling or decision shall become effective 60 days after the date of its publication.

applied in HRL 951754, or by adding the new criterion of "a functional fly." *See* 19 U.S.C. § 1625(c)(1). *Plaintiff's Motion for Preliminary Injunction* at 12–16; *see also, Plaintiff's Amended Pretrial Statement* at Count I.

Plaintiff also argues that, in assigning the HTSUS classification in issue *after* the release of plaintiff's merchandise as entered, Customs improperly modified prior treatment of substantially identical transactions in violation of 19 U.S.C. § 1625(c)(2). Complaint ¶ 21; *Plaintiff's Motion for Preliminary Injunction* at 16–17. Additionally, plaintiff maintains that Customs' failure to apprise it that classification was still in question deprived plaintiff of the opportunity to alter its operations and was so fundamentally prejudicial as to amount to a deprivation of due process. Complaint ¶ 21; *Plaintiff's Motion for Preliminary Injunction* at 18–19. Plaintiff contends that, consequently, HRL 957068 is null and void and HRL 087940 must be held applicable to women's boxers until such time as Customs complies. *Plaintiff's Amended Pretrial Statement* at Count I; *Plaintiff's Motion for Preliminary Injunction* at 17.

Classification of Plaintiff's Merchandise:

Pursuant to 28 U.S.C. § 2639(a)(1) (1988), tariff classifications made by Customs are presumed to be correct and the burden of proving that the assigned classification is erroneous is upon the challenging party. *See, e.g., Nippon Kogaku (USA), Inc. v. United States,* 69 CCPA 89, 92, 673 F.2d 380, 382 (1982). To determine whether the party challenging Customs' classification has overcome the statutory presumption of correctness, the Court must consider whether "the government's classification is correct, both independently and in comparison with the importer's alternative." *Jarvis Clark Co. v. United States,* 733 F.2d 873, 878 (Fed. Cir. 1984).

The Court finds that, based on the facts of this case, the boxers in issue are properly classifiable as underwear under 6208.91.3010, HTSUS.

The courts have delineated various considerations for ascertaining proper classification. For example, *St. Eve Int'l,* 11 CIT at 224, established that the "chief" use of a garment outweighs other uses for purposes of classification. *St. Eve Int'l* followed the standard established in *Mast Indus., Inc. v. United States,* 9 CIT 549, 553 (1985), *aff'd,* 786 F.2d 1144 (Fed. Cir. 1986), which based its decision in a shirts versus nightshirts classification question on an *in camera* inspection of the merchandise and a trial which established the design intention of the manufacturer and the methods by which the merchandise was marketed and advertised. Additionally, in *Hampco Apparel,* 12 CIT at 96, a swimwear versus shorts question, the Court found that, notwithstanding any fugitive use, classification is appropriate according to the garment's original and primary use, as dictated by its primary design, construction and function. Further, in the case of *United States v. Carborundum Co.,* 63 CCPA 98, 102, C.A.D. 1172, 536 F.2d 373, 377, *cert. denied, Carborundum Co. v. United States,* 429 U.S. 979 (1976), the ap-

peals court set out the following classification considerations: the general physical characteristics of the merchandise; the expectations of the ultimate purchasers; the channels, class or kind of trade in which the merchandise moves; the environment of the sale and the manner in which the merchandise is advertised and displayed; the use, if any, in the same manner as merchandise which defines the class; the economic practicality of so using the import; and the recognition in the trade of this use.

During trial in the instant case, Field National Import Specialist Shelley Thalrose of JFK Customs defined a "fly" as an opening in the front of a garment, irrespective of whether the opening may also have buttons or a zipper. She then applied the seven criteria of HRL 087940, which are referenced in HRL 951754,[8] to plaintiff's Exhibits 1A and 1B.[9] She testified that plaintiff's Exhibit 1B had a fly but that Exhibit 1A lacked a fly because of the two lines of stitching sewn horizontally across the opening. She admitted that, in spite of the seams, one of the three open spaces in the fly created by the stitching was about the width of three of her fingers. She testified that Exhibit 1B met 6 of the 7 criteria and was presumptively underwear.

Customs' witness, Professor Gloria Hartley of the Fashion Institute of Technology and Parsons School of Design, an expert in garment product development, marketing and merchandising, and familiar with Customs' rules, also applied the seven criteria to plaintiff's Exhibits 1A and 1B. She also opined that Exhibit 1A lacked a fly but that Exhibit 1B had a fly. On cross-examination, she testified that boxer shorts could be underwear, that flannel boxers could be worn for warmth, and that not all panties have a crotch lining.

Lay witness, Fred Siegel, a principal in Secretly Yours for over ten years, also evaluated plaintiff's Exhibit 1A according to the criteria and opined that it had a fly. Mr. Siegel also testified that plaintiff's garments were designed as panty alternatives, intended to be worn against the body, and that plaintiff's boxer and panty coordinates were not designed to be worn together. Further, Mr. Siegel testified that, with some modification to the legs, the subject boxers were designed from the specifications for men's underwear.

Plaintiff's witness, Leona Siegel, an Account Executive for Inner Secrets/Secretly Yours and an expert in the design, manufacturing, marketing and sale of intimate apparel, opined that plaintiff's trial Exhibits 1A and 1B both had a fly and were underwear. She also testified that plaintiff's customers sell the subject boxers as underwear in their underwear departments and that plaintiff's Hong Kong manufacturer is an underwear company. In addition, she testified that plaintiff's show-

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[8] Plaintiff's Trial Exhibit 24 at 3.

[9] It is uncontroverted that Ms. Thalrose's expertise is in knitwear not woven garments, yet she had opined that plaintiff's initial imports were outerwear. Plaintiff's Trial Exhibit 28 ¶ 8.

Only plaintiff's Exhibit 1A is at issue in this case. This boxer-style garment has the two lines of stitching sewn horizontally across the fly, dividing the opening into thirds. Plaintiff's merchandise, Exhibit 1B, is also a pair of boxers but is not at issue. It has an unobstructed fly.

room shares a location primarily with other lingerie showrooms and is located in New York City's lingerie district.

Plaintiff's witness, Kathleen Zirnhelt, Vice President and General Manager of intimate apparel for Gitano Fashion Industries, Ltd. ("Gitano"), an expert on intimate apparel, opined that plaintiff's Exhibits 1A and 1B were both underwear. She based her opinion on the garments' shape, comfort waistband, loose stitching and covered seams. In addition, Ms. Zirnhelt testified that garments bought as intimate apparel are generally worn as intimate apparel. To show how the subject boxers are perceived by the intimate apparel industry, she testified that Gitano would not market the subject boxers as outerwear. With the same objective, plaintiff offered the expert testimony of Michael Mandelbaum, an intimate apparel buyer for over 150 retail stores which sell intimate apparel and outerwear. Mr. Mandelbaum, who is also experienced in designing intimate apparel in collaboration with designers, opined that the subject boxers are underwear and should be ticketed as lingerie and displayed in lingerie departments. He based his opinion on the garment's design, softness, waistband and stitching.

Plaintiff exhibited the practicality of using the imported merchandise as underwear by having a professional model display a plaid kilt skirt worn over the subject boxers which were worn next to the skin, with knee high socks.

Further, plaintiff offered two photographs into evidence which, according to Leona Siegel, reflected that the boxers in issue was merchandised in the intimate apparel departments by plaintiff's retail customers. Plaintiff's Exhibit 2; *see also*, Plaintiff's Trial Exhibit 4.

To corroborate testimony, plaintiff also offered into evidence several purchase orders, which Leona Siegel identified as requests for quantities of the subject boxers from the intimate apparel department of one of plaintiff's retail customers. *See* Plaintiff's Trial Exhibit 4a. Plaintiff also offered into evidence various advertisements. Plaintiff's Trial Exhibit 8 showed that the subject boxers were marketed by one of plaintiff's retail customers in a manner which may be deemed to suggest that the garments are underwear. The garments were identified as "bra and panty coordinates." Additionally, plaintiff offered an ad from a major department store showing merchandise similar to the subject boxers marketed as lingerie. *See* Plaintiff's Trial Exhibit 9.

During direct examination, Professor Hartley testified that the current fashion trend is for women to wear men's boxer shorts as outerwear. She further testified that she had conducted a survey of 136 students, ages 14–28, to determine how they would use the subject boxers. She found that only one student would wear the boxers as underwear.

On cross-examination, Professor Hartley was questioned regarding the definition of "boxers" in *Fairchild's Dictionary of Fashion* 379, which states that boxers are "[w]omen's and children's loose-legged *panties styled like men's boxer shorts.*" Defendant's Trial Exhibit B (em-

phasis added). She testified that women's boxer shorts styled like men's boxer shorts could be panties. However, she disagreed with *Fairchild's Dictionary of Fashion* 412 (2d ed. 1988), that boxers are "[w]omen's and children's loose-legged *panties* of pull-on type." Plaintiff's Trial Exhibit 25 (emphasis added).

To counter plaintiff's documentary evidence, Customs proffered various catalog advertisements depicting boxers, similar to plaintiff's merchandise, in a context which suggested outerwear and loungewear or sleepwear usage. *See* Defendants' Trial Exhibit G1, G2 and G3. The similarity between the garments in Customs' exhibits and plaintiff's merchandise was mostly visual as plaintiff established that, with respect to Exhibits G1 and G2, details such as the absence or presence of a fly, pockets or belt loops, and the fabric weight were not discernible by visual inspection.

Finally, much time was spent at trial by Customs in trying to show that the term "intimate apparel" encompasses apparel other than underwear and that plaintiff's licensing agreement for the "No Excuses" label is not limited to underwear. However, testimony elicited by Customs did not aid its position in any dispositive way.

Upon consideration of all of the proffered testimonial and documentary evidence introduced at trial, case law, and based on the Court's *in camera* evaluation of the subject merchandise, the Court agrees with plaintiff that the boxers in issue do not come within the classification of outerwear shorts.

The Court finds that a fly is one of the physical characteristics of the subject boxers. It was demonstrated at trial that the fly is not eliminated by the stitching across the fly's opening. Further, it was established that, according to Customs' own criteria, plaintiff's garments with a fly are presumptively underwear.

Furthermore, plaintiff's preferred classification is supported by evidence that the boxers in issue were designed to be worn as underwear and that such use is practical. In addition, plaintiff showed that the intimate apparel industry perceives and merchandises the boxers as underwear. While not dispositive, the manner in which plaintiff's garments are merchandised sheds light on what the industry perceives the merchandise to be. Plaintiff also established that it is considered an underwear resource, that the Hong Kong factory which manufactures its merchandise does not produce outerwear, and that its showroom is in an intimate apparel locale.

Further, evidence was provided that plaintiff's merchandise is marketed as underwear. While advertisements also are not dispositive as to correct classification under the HTSUS, they are probative of the way that the importer viewed the merchandise and of the market the importer was trying to reach. *Marubeni Am. Corp. v. United States,* 17 CIT ____, ____, 821 F. Supp. 1521, 1528 (1993), *aff'd,* 35 F.3d 530 (Fed. Cir 1994). In addition, while Professor Hartley's testimony regarding usage

is credible, her survey's limited geographic scope diminishes its probative value regarding ultimate or chief use.

For the foregoing reasons, the Court finds that plaintiff has overcome the presumption of correctness which attaches to Customs' classifications. Therefore, the merchandise in issue is properly classifiable under 6208.91.3010, HTSUS, subject to visa quota category 352.

Moreover, the Court finds no merit to plaintiff's allegations concerning 19 U.S.C. § 1625(c)(1) and (2). Customs' HRL 957068 explicitly stated, HRL 951754 "will be modified." Customs' HRL 957068 found that plaintiff's merchandise met two of the criteria and bolstered that finding with further support to counter rebuttal. *Plaintiff's Motion for Preliminary Injunction,* Exhibit F at 4–5. Therefore, it is manifestly clear that Customs did not ignore or modify the criteria of HRL 087940 and, therefore, the notice and comment requirements of 19 U.S.C. § 1625(c)(1) were not implicated.

In addition, although post-release decisions may modify classification, they are not unlawful. Precedential significance attaches to final, binding liquidation, not to releases. 19 U.S.C. § 1514 (1988) and 19 C.F.R. § 141.113 (1994).[10] The Court recognized this critical distinction in its decision denying plaintiff's motion for a preliminary injunction. *See Inner Secrets/Secretly Yours,* 19 CIT at ____, Slip Op. 95–22. In Slip Opinion 95–22, the Court dismissed plaintiff's irreparable injury claim noting that, notwithstanding the release of plaintiff's imports, the risk remained with plaintiff regarding future undertakings that, "based on further developments, Customs could still challenge plaintiff's classification of unliquidated imports" and "seek their redelivery." *Id.* at 12. Therefore, Customs did not modify prior treatment of substantially identical transactions in violation of 19 U.S.C. § 1625(c)(2) or violate plaintiff's due process rights.

CONCLUSION

For the reasons discussed above, the Court finds that plaintiff has overcome the presumption of correctness accorded Customs' classifications. Therefore, Customs' classification of plaintiff's boxer-style merchandise as outerwear shorts under 6204.62.4055, HTSUS, subject to textile category 348 is incorrect. Customs is instructed to enter the merchandise in issue under the classification 6208.91.3010, HTSUS, subject to visa quota category 352.

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[10] Pursuant to 19 U.S.C. § 1514, liquidations are "final and conclusive" unless protested. Accordingly, section 1514 explicitly enables the importer to rely upon the finality of liquidation. In addition, 19 C.F.R. § 141.113 provides:

Recall of merchandise released from Customs custody.

* * * * * * *

(b) *Other merchandise not entitled to admission.* If at any time after entry the district director finds that any merchandise contained in an importation is not entitled to admission into the commerce of the United States for any reason not enumerated in paragraph (a) of this section, he shall promptly demand the return to Customs custody of any such merchandise which has been released.

* * * * * * *

(f) *Time limitation.* A demand for the return of merchandise to Customs custody shall not be made after the liquidation of the entry covering such merchandise has become final.

(Slip Op. 95–61)

UNITED STATES, PLAINTIFF *v.* ZIEGLER BOLT AND PARTS CO., DEFENDANT

Court No. 93–03–00162

Defendant moves to quash service of process and to dismiss the complaint for lack of personal jurisdiction. Defendant timely raised the affirmative defenses of insufficiency of service of process and lack of personal jurisdiction in its answer. Plaintiff opposes defendant's motion and argues defendant was properly served in accordance with the rules of this Court and further that defendant has waived its privilege to assert these defenses.

Held: Counsel for defendant had no express or implied authority to accept service of process on behalf of defendant corporation Ziegler Bolt. The return of the signed Acknowledgement Form in this action did not constitute acceptance of service on behalf of Ziegler Bolt. Defendant properly preserved the defenses of insufficiency of service of process and lack of personal jurisdiction by raising the defenses in the answer in accordance with the Court's rules. Neither defendant's participation in this action nor defendant's filing of a motion for summary judgment waived the defenses raised in defendant's answer. Plaintiff failed to effect service of the summons and complaint upon defendant Ziegler Bolt within 120 days after the action was commenced as required by U.S. CIT R. 4(h) (1993) and therefore this action is dismissed.

(Dated April 12, 1995)

Frank W. Hunger, Assistant Attorney General of the United States; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, United States Department of Justice, *(Patricia L. Petty); Jeffrey Reim,* Office of Chief Counsel, United States Customs Service, of Counsel, for Plaintiff.

Day, Ketterer, Raley, Wright & Rybolt (Matthew Yackshaw), for Defendant.

OPINION

CARMAN, *Judge:* Plaintiff commenced this action to recover civil penalties from defendant for violations of 19 U.S.C. § 1592 (1988) and to recover marking duties for violations of 19 U.S.C. § 1304 (1988). The United States Court of International Trade (CIT or Court) previously denied defendant's motion for summary judgment and plaintiff's motion for partial summary judgment and held, inter alia, there were material questions of fact, which facts were better left for determination at trial. *See United States v. Ziegler Bolt & Part Co.,* Slip Op. 95–3 at 11, 25 (Jan. 13, 1995). Trial is set for May 1, 1995.

Defendant now moves to quash service of process and to dismiss the complaint for lack of personal jurisdiction. Defendant claims plaintiff failed to effect service of process upon defendant, and therefore, the Court has no personal jurisdiction over defendant. Plaintiff bears the burden of establishing service of process was valid.[1] The Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1582 (1988).

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[1] *See Familia de Boom v. Arosa Mercantil, S.A.,* 629 F.2d 1134, 1139 (5th Cir. 1980) ("[W]hen service of process is challenged, the party on whose behalf service is made has the burden of establishing its validity.") (citing 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1353 (1st ed. 1969)), *cert. denied,* 451 U.S. 1008 (1981).

FACTS

Upon consideration of defendant's motion, and plaintiff's response thereto, and all other papers and pleadings had herein,[2] the Court finds:

Plaintiff commenced this action on March 15, 1993, by sending the summons and complaint to the Clerk of the Court by certified mail return receipt requested pursuant to U.S. CIT R. 5(e) (1993).[3] On the same day, plaintiff sent the summons, complaint, and a Notice and Acknowledgement of Receipt of Summons and Complaint (CIT Form 14) to Matthew Yackshaw, Esq., counsel for defendant, by certified mail return receipt requested. Mr. Yackshaw signed page two of CIT Form 14 (Acknowledgement Form), which is reprinted in full below with the text added by Mr. Yackshaw marked in bold:

Court No. 93–03–00162

CIT Form 14 Page 2

ACKNOWLEDGEMENT OF RECEIPT OF SUMMONS AND COMPLAINT

I declare, under penalty of perjury, that I received a copy of the summons and complaint in the above-captioned matter at **Canton, Ohio by certified mail, return receipt requested, on March 17, 1993.**

/s/ Matthew Yackshaw
Signature

Attorney for Defendant
Relationship to Entity/Authority to Receive Service of Process

April 5, 1993
Date of Signature

On April 5, 1993, defendant filed its answer, which included among the several defenses:

EIGHTH DEFENSE

The Court lacks personal jurisdiction over Defendant.

NINTH DEFENSE

The Complaint is barred because of insufficiency of service of process upon Defendant.

(Answer at 2.) Mr. Yackshaw declares he "has never been authorized to accept service of process on behalf of Defendant on any matters, including this case." Defendant served its answer on plaintiff's counsel on April 5, 1993, and included the Acknowledgement Form.

[2] After a review of the parties' papers, including plaintiff's concession that, "[g]enerally, the facts as stated by the defendant are not in dispute," (Pl.'s Opp. to Def.'s Mot. to Quash Service of Process and to Dismiss Compl. (Pl.'s Br.) at 2), and in light of the absence of a request for a hearing in this matter, the Court determines a hearing is not necessary to resolve any factual issues occasioned by defendant's motion.

[3] The Court amended its rules on October 5, 1994, with changes effective January 1, 1995. Because plaintiff attempted service in this action prior to the rule changes, all citations and discussions of the CIT rules in this opinion relate to the version of the rules in effect when service was attempted in this action—March 15, 1993. *See Hunt v. Department of the Air Force*, 787 F. Supp. 197, 199 (M.D. Fla. 1992) ("The law in effect at the time of service continues to control the jurisdictional issue even though subsequent to that service * * * a new statute or amendment has been enacted.") (citation omitted), *aff'd*, 29 F.3d 583 (11th Cir. 1994).

The president and majority shareholder of the Ohio corporation Ziegler Bolt and Parts Company (Ziegler Bolt), William A. Ziegler, Sr., affirms he has served as the statutory agent for Ziegler Bolt from its inception to the present. Mr. Ziegler declares his status as statutory agent is a matter of public record on file with the Ohio Secretary of State's office. He understands Mr. Yackshaw received a summons, complaint, CIT Form 5, and CIT Form 14 from plaintiff's counsel on March 17, 1993. Mr. Ziegler states "No part of the package was ever served upon Ziegler Bolt or me as its statutory agent." He further attests, "No one else, including Matthew Yackshaw and the law firm of Day, Ketterer, Raley, Wright & Rybolt, have [sic] ever been authorized to accept service of process on behalf of Defendant on any matters, including this case." Plaintiff concedes it has no evidence that the summons and complaint were served on the offices of Ziegler Bolt or on its statutory agent, Mr. Zielger.[4]

Mr. Yackshaw represented Ziegler Bolt before the United States Customs Service (Customs) at the administrative proceedings that took place before the commencement of this civil action. In a letter dated January 29, 1990, Mr. Yackshaw responded to an administrative summons Customs issued to Ziegler Bolt. Mr. Yackshaw closed the letter stating, "In the future, please forward to me a copy of any information request you may serve upon Ziegler Bolt."

Before this action commenced on March 15, 1993, plaintiff's counsel sent a letter to Mr. Yackshaw informing him that "Ziegler Bolt and Parts Co. and Arthur Paul Ziegler Penalty Case No. 89–4104–20136" had been referred to the Department of Justice for collection. The letter indicated the statute of limitations was set to expire on March 3, 1993, and advised Mr. Yackshaw that "In the event that you are interested in discussing this matter, we will need a waiver of the statute of limitations, to be executed by an appropriate officer of Ziegler as well as by Mr. Ziegler, along with a corporate resolution."

In preparation for trial, the parties filed a proposed pretrial order on January 20, 1995. In *Defendant's Statement on Jurisdiction* (Schedule B–2) of the proposed pretrial order, the defendant stated:

> Defendant contests personal jurisdiction based upon insufficiency of service of process and insufficiency of process. See CIT Rule 12(b)(3) & (4). The time limit for making service of process has expired. See CIT Rule 4(h). Plaintiff never served the Company or the Company's statutory agent with process. See CIT Rule 4(d)(3).

(Proposed Pretrial Order at Sched. B–2.) The defenses raised in Schedule B–2 triggered a request from the Court for the parties to brief the defenses of insufficiency of service of process and insufficiency of process.[5]

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[4] "The Plaintiff has found no evidence to contradict defendant's assertion that a copy of the summons and complaint was not served by mail or in person at the offices of the defendant or upon the defendant's designated representative to receive service of process, Mr. William Ziegler, Sr." (Pl.'s Br. at 2.)

[5] Although defendant styles its defense as "insufficiency of process" in the proposed pretrial order, the affirmative defense raised in the answer and here by motion is "insufficiency of service of process." On March 15, 1995, the Court held a telephone status conference with counsel for plaintiff and counsel for defendant to discuss the proposed pretrial order. During this conference the Court requested briefing on these defenses.

CONTENTIONS OF THE PARTIES

Defendant contends plaintiff failed to serve the defendant within 120 days after the action was commenced as required by U.S. CIT R. 4(h). Additionally, defendant maintains plaintiff has not shown good cause why service was not made within that period. (Def.'s Mot. to Quash Service of Process and to Dismiss Compl. (Def.'s Br.) at 3–4, 5 (citing *United States v. General Int'l Marketing Group,* 14 CIT 545, 742 F. Supp. 1173 (1990)).) Defendant asserts service upon a law firm retained by a corporate defendant is not considered sufficient service unless it is shown the law firm was specifically authorized and designated by defendant to receive service of process. *(Id.* at 4 (quoting *Davis-Wilson v. Hilton Hotels Corp.,* 106 F.R.D. 505, 508 (E.D. La. 1985) and citing *Michelson v. Merrill Lynch Pierce, Fenner & Smith, Inc.,* 619 F. Supp. 727 (S.D.N.Y. 1985); *Gibbs v. Hawaiian Eugenia Corp.,* 581 F. Supp. 1269 (S.D.N.Y. 1984)).) Defendant maintains "Defendant's attorney was not statutory agent for Defendant and was not authorized to receive service of process." *(Id.)*

Moreover, defendant rejects any argument that Mr. Yackshaw's signature on the Acknowledgement Form "constitutes or is deemed to be service of process upon Defendant." *(Id.* at 5.) Defendant maintains that although the instructions in CIT Form 14 may be ambiguous, defendant clarified any ambiguity by raising the affirmative defenses of the lack of personal jurisdiction and the insufficiency of service of process in the answer. *(Id.)*

Plaintiff generally responds by claiming defendant was properly served in accordance with the Court's rules and that defendant has waived its privilege to assert the defenses of insufficiency of service of process and lack of personal jurisdiction. Plaintiff's first argues it followed the strictures of U.S. CIT R. 4(c)(1)(C)(ii) by mailing the summons and complaint to counsel for defendant, Mr. Yackshaw. Plaintiff maintains that the January 29, 1990, letter from Mr. Yackshaw to Customs and the February 24, 1993, letter from plaintiff's counsel to Mr. Yackshaw indicate Mr. Yackshaw "was representing the defendant regarding the penalty notice that issued in November, 1989, and regarding the Government's subsequent actions to collect the penalty." (Pl.'s Br. at 6.) Thus, when Mr. Yackshaw returned the Acknowledgement Form that accompanied the summons and complaint to plaintiff's counsel, "the Government was led to believe * * * that service by mail to Mr. Yackshaw was sufficient and that personal service of the complaint and summons, as provided indicated [sic] in Rule 4(d)(3), would not be necessary." *(Id.)* As the plaintiff perceives it,

> Because counsel for the defendant, Mr. Yackshaw, timely returned the acknowledgement, with no indication that he was not authorized to accept service on behalf of the defendant, there was no reason for the Government to suspect that service by this method authorized under the Rules was defective in any way.

(Id. at 7; *see also id.* at 8 ("The acknowledgement of service returned by the defendant contains no suggestion that the defendant did not consent to this type of service.").)

Plaintiff rejects defendant's argument that the Acknowledgement Form should be read in conjunction with the answer, which raised the affirmative defenses of lack of personal jurisdiction and insufficiency of service of process, thereby giving plaintiff notice defendant was contesting service of process. *(Id.* at 8 (citing Def.'s Br. at 3).) Plaintiff characterizes these two affirmative defenses in the answer as "part of a laundry list of affirmative defenses" and argues,

> Because the acknowledgement of service of process was timely returned, there was no reason to interpret the defense of insufficiency of process [sic] to be more than a part of a listing of all possible defenses that the defendant may or may not pursue.

(Id.)

Turning to plaintiff's second argument, plaintiff attempts to distinguish the cases cited by defendant and argues mail service upon Mr. Yackshaw was effective because Mr. Yackshaw had implicit authority to accept service on behalf of defendant. *(Id.* at 9–11 (discussing *General Int'l Marketing Group; Gibbs;* and *Michelson).)* First, plaintiff argues *General Int'l Marketing Group* is "factually distinguishable from this case" because the issue in that case was whether the government showed good cause why the defendants were not served within 120 days after the complaint was filed with the Court as required by U.S. CIT R. 4(h). *(Id.* at 9 (citation omitted).) Furthermore, while plaintiff agrees with defendant that the CIT in *General Int'l Marketing Group* declared "service upon the attorney for a defendant did not constitute sufficient service absent authority of the attorney to accept service of process," plaintiff characterizes this pronouncement as dicta. *(Id.* at 10.) Second, plaintiff maintains the court in *Gibbs* determined that "service upon a law firm of a company that was not located within the state where the lawsuit was filed was insufficient where the law firm performed mostly 'professional functions' and there was no evidence that the law firm was an agent for any purpose." *(Id.* at 10–11 (citing *Gibbs*, 581 F. Supp. at 1271).) In this action, plaintiff argues,

> Mr. Yackshaw represented the defendant during the administrative proceedings of this case as well as engaged in communications with counsel for the plaintiff prior to the filing of the compliant, suggesting that he had implicit authority to accept service on behalf of the defendant.

(Id. at 11.) Finally, in contrast to *Michelson,* where the court and plaintiff were aware the law firm was not authorized to accept service of behalf of its client, plaintiff claims defendant's conduct in the present case induced plaintiff to believe service was perfected:

> Here, by its motion, the defendant for the first time advises the Court and the plaintiff that Mr. Yackshaw did not have authority to accept service of process on behalf of the defendant. The defendant,

> through Mr. Yackshaw, has extensively participated in discovery and filed various motions. Based upon participation by the defendant, through its attorney, Mr. Yackshaw, the plaintiff ws [sic] led to believe that Mr. Yackshaw was implicitly authorized to accept service on behalf of the defendant.

(Id.)

Plaintiff's third argument is that assuming arguendo Mr. Yackshaw did not have explicit or implicit authority to accept service of process on behalf of defendant, defendant waived its defenses of lack of personal jurisdiction and insufficiency of service of process. *(Id.* at 12–16.) Plaintiff admits that "[t]echnically, the defendant did not waive these defenses because they were asserted in the defendant's answer." *(Id.* at 13.) Plaintiff argues, however, these defenses are not preserved "'in perpetuity.'" *(Id.* (quoting *Burton v. Northern Dutchess Hosp.*, 106 F.R.D. 477, 481 (S.D.N.Y. 1985) and citing several cases for the proposition that "[t]hese privileged defenses may be waived by 'formal submission in a cause, or by submission through conduct.'") (citations omitted).) Instead, plaintiff contends defendant waived the two defenses by "fail[ing] to pursue the two defenses at issue until the Court inquired about the defenses" during the telephone status conference on March 15, 1995. *(Id.* at 14–15.) Furthermore, plaintiff suggests, "defendant has demonstrated that it was on notice of the charges contained in the complaint." *(Id.* at 15.)

To advance its argument defendant waived the two affirmative defenses, plaintiff also alleges defendant's pending motion to dismiss the complaint on the grounds of lack of personal jurisdiction is "unseasonable and also is waived pursuant to Rule 12(g)." *(Id.)* Plaintiff argues U.S. CIT R. 12(g) requires a party to assert all of its defenses and objections at the same time, with some exceptions, or the party will be precluded from raising them later. *(Id.)* Plaintiff reasons "Rule 12(g) has been read broadly to include not only motions previously filed pursuant to Rule 12, but Rule 56 summary judgment motions as well." *(Id.* at 16 (citing *Burton*, 106 F.R.D. at 481).) Thus, when defendant moved for summary judgment and failed to raise the defenses of insufficiency of service of process and lack of personal jurisdiction, plaintiff contends, defendant waived those defenses.[6] *(Id.* ("To permit the defendant to raise lack of personal jurisdiction so late in the litigation, just prior to trial, contravenes the spirit of Rule 12(g), which is to consolidate a party's defenses, and would encourage piecemeal determinations of the validity of defenses.") (citation omitted).)

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[6] Plaintiff also contends defendant fails to mention the affirmative defense of insufficiency of service of process in the proposed joint pretrial order and therefore, defendant "is deemed to have abandoned this affirmative defense." (Pl.'s Br. at 3 n.3 (citation omitted).) The Court notes, however, that defendant clearly articulated its concern regarding service of process in the proposed order. *(See* Proposed Pretrial Order at Sched. B–2 ("Defendant contests personal jurisdiction *based upon insufficiency of service of process* * * *.") (citing U.S. CIT R. 12(b)(4)) (emphasis added).)

DISCUSSION

A. *U.S. CIT R. 4—Service of Summons and Complaint:*

The Court's rules provide several ways to serve a defendant. *See* U.S. CIT R. 4(c). The method chosen by the plaintiff in this action provides:

> (C) A summons and complaint may be served upon a defendant of any class referred to in paragraph (1) or (3) of subdivision (d) of this rule—
>
> * * * * * * *
>
> (ii) by mailing a copy of the summons and complaint by first-class mail, postage prepaid, to the person to be served, together with two copies of a notice and acknowledgment which shall be substantially in the form set forth in Form 14 of the Appendix of Forms and a return envelope, postage prepaid, addressed to the sender. If no acknowledgment of service under this subdivision of this rule is received by the sender within 20 days after the date of mailing, service of such summons and complaint shall be made under subparagraph (A) or (B) of this paragraph in the manner prescribed by subdivision (d)(1) or (d)(3).

U.S. CIT R. 4(c)(1)(C)(ii). The "person to be served" in the instant action was the Ohio corporation, Ziegler Bolt. The Court's rules require service upon a corporation to be made by

> delivering a copy of the summons and the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service, and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant.

U.S. CIT R. 4(d)(3). Regardless of the type of service employed, the rules mandate service of the summons and complaint to be made within 120 days after the action is commenced unless the party attempting service can show good cause why such service was not made within that period.[7]

B. *Return of the Acknowledgement Form:*

Plaintiff argues it was "led to believe * * * service by mail to Mr. Yackshaw was sufficient" because Mr. Yackshaw returned the Acknowledgement Form accompanying the summons and complaint "with no indication that he was not authorized to accept service on behalf of the defendant." (Pl.'s Br. at 6, 7.) Plaintiff's argument fails first because Mr. Yackshaw was not the "person to be served" under Rule 4 and therefore plaintiff's mailing of the summons and complaint to Mr. Yackshaw was without effect. *See* U.S. CIT R. 4(c)(1)(C)(ii). Second, even if Mr. Yackshaw was the proper person to be served, return of the Acknowledgement Form does not constitute consent to the manner of service. Finally, the Court finds no requirement in the rules that the signatory of the Acknowledgement Form must state objections to service on the Form.

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[7] The time for service requirement is found in Rule 4(h):

> If a service of the summons and complaint is not made upon a defendant within 120 days after the action is commenced and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion.

U.S. CIT R. 4(h).

Plaintiff's action was against Ziegler Bolt and it is Ziegler Bolt the plaintiff was required to serve under the rules. As discussed below, Mr. Yackshaw had no authority, express or implied, to accept service of process on behalf of Ziegler Bolt. Therefore, the plaintiff simply sent the summons and complaint to the wrong person. Mr. Yackshaw's return of the Acknowledgement Form merely informs plaintiff that Mr. Yackshaw *received* the documents the plaintiff sent—it says nothing about whether attempted service was on the correct person.

Assuming for the sake of argument that Mr. Yackshaw was the proper person to be served, his return of the Acknowledgement Form does not manifest defendant's consent to the manner of service. Because the Court's rules are substantially the same as the Federal Rules of Civil Procedure (FRCP),[8] the Court has found it appropriate to consider decisions and commentary on the FRCP for guidance in interpreting its own rules. *See Tomoegawa (U.S.A.), Inc. v. United States*, 15 CIT 182, 185–86, 763 F. Supp. 614, 617 (1991) (Re, C.J.) (stating that because the Court's rules mirror the FRCP, "it is without question that this court may look to the decisions and commentary on the Federal Rules in the interpretation of its own rules") (citations omitted). The CIT Form 14 is virtually identical to Form 18–A of the FRCP.[9] *See* Fed. R. Civ. P. Appendix of Forms Form 18–A (1992), *superseded by* Forms 1A and 1B (eff. Dec. 1, 1993).

In construing the significance of FRCP Form 18–A, courts have rejected the argument that return of the form constitutes a consent to service of process or acts as a waiver of any objection to the manner of service. *See Crocker Nat'l Bank v. Fox & Co.*, 103 F.R.D. 388 (S.D.N.Y. 1984); *William B. May Co. v. Hyatt*, 98 F.R.D. 569 (S.D.N.Y. 1983). One court noted the language in Form 18–A is of "such compelling tone that parties receiving it would feel required to complete and return it whether they believed—or even knew—that there was a valid objection to the manner of service or not." *William B. May Co.*, 98 F.R.D. at 571 (construing an acknowledgement form that substantially duplicates Form 18–A). Thus, it is "inappropriate to treat mere return of the form as a waiver of any objections to the manner of service." *Id.* In another case where counsel for defendants argued they did not return the Acknowledgement Form because they feared acknowledgement might constitute an implicit waiver of jurisdictional defenses, the court responded: "This argument is clearly wrong. It confuses service with jurisdiction." *Crocker Nat'l Bank*, 103 F.R.D. at 391 n.5; *see also* 4A Wright & Miller § 1092.1 at 59 ("Acknowledging receipt of service by mail does not waive defendant's right to challenge sufficiency of service."). This Court

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[8] The FRCP were amended on April 22, 1993, with changes effective December 1, 1993. Because plaintiff attempted service in this action prior to the rule changes, all citations and discussions of the FRCP in this opinion relate to the version of the rules in effect when service was attempted in this action—March 15, 1993. *See supra* note 3.

[9] The only difference between CIT Form 14 and FRCP Form 18–A is the rule cited in the text of each form as the authority for using each form. In FRCP Form 18–A, the second paragraph states, "The enclosed summons and complaint are served pursuant to Rule 4(c)(2)(C)(ii) of the Federal Rules of Civil Procedure." In contrast, the corresponding paragraph in the CIT Form 14 states, "The enclosed summons and compláint are served pursuant to Rule 4(c)(1)(C)(ii) of the Rules of the United States Court of International Trade."

agrees, finding the return of the Acknowledgement Form alone does not constitute consent to service or act as a waiver of any objection to the manner of service.

Again assuming arguendo Mr. Yackshaw was the proper person to be served, the Court is unpersuaded by plaintiff's argument that Mr. Yackshaw accepted service on behalf of Ziegler Bolt by returning the Acknowledgement Form without noting any objections to service. There is no requirement, either in the instructions accompanying CIT Form 14 or in U.S. CIT R. 4(c)(1)(C)(ii), that the signatory of the Acknowledgement Form indicate any objections to the manner of service on the form. Furthermore, U.S. CIT R. 12(b) requires challenges to service or personal jurisdiction be asserted in a responsive pleading or by motion—precisely the course taken by defendant when it raised the defenses in the answer. If plaintiff believed it had no indication defendant was not authorized to receive process, any such delusion should have been dispelled by a reading of the answer where the defendant informed plaintiff that something was amiss with service in this action. Instead, plaintiff apparently chose to disregard this portion of the answer as "part of a laundry list of affirmative defenses." (*See* Pl.'s Br. at 8.)

C. *Agency and Service of Process:*

Mr. Yackshaw affirms he has "never been authorized to accept service of process on behalf of Defendant on any matters, including this case." (Yackshaw Aff. ¶ 7.) Mr. William A. Ziegler, Sr. declares that no one other than he has "ever been authorized to accept service of process on behalf of Defendant on any matters, including this case." (Ziegler Aff. ¶ 6.) Plaintiff does not dispute this. In fact, plaintiff admits Mr. Yackshaw signed the Acknowledgement Form "in his position as the attorney for the defendant." (Pl.'s Br. at 2.) Plaintiff insists, however, that Mr. Yackshaw, as attorney for the defendant, was the proper party to serve in this action. *(See id.* at 6.) Thus, the thrust of plaintiff's argument is that Mr. Yackshaw had the implicit authority to receive service of process on behalf of the corporation. *(See, e.g., id.* at 11.) The Court notes, however, mere acceptance of service does not evidence the authority to accept service on behalf of the principal. *United States v. Marple Community Record, Inc.*, 335 F. Supp. 95, 102 (E.D. Pa. 1971) ("Obviously, something more than mere acceptance must be shown to demonstrate an agency relationship for this specific purpose [of accepting service].") (quoting James W. Moore, *Moore's Federal Practice* § 4.12 (2nd ed.)).

Plaintiff's argument of implicit authority hinges on Mr. Yackshaw's prior representation of Ziegler Bolt at the administrative proceedings and on defendant's conduct in this action. *(See id.* at 6, 11.) The Court is unpersuaded by this argument. It is an elementary law of agency that "any agent who accepts service must be shown to have been authorized to bind his principal by the acceptance of process." *Schwarz v. Thomas*, 222 F.2d 305, 308 (D.C. Cir. 1955); *see also* 4A Wright & Miller § 1097 at 85–86 ("[D]efendant's attorney probably will not be deemed an agent appointed to receive process absent a factual basis for believing that an

appointment of this type has taken place."). Thus, an attorney is not authorized to receive service of process solely by reason of the attorney's status as counsel. *Durbin Paper Stock Co. v. Hossain*, 97 F.R.D. 639, 639 (S.D. Fla. 1982) (citing *Ransom v. Brennan*, 437 F.2d 513, 518 (5th Cir.), *cert. denied*, 403 U.S. 904 (1971)); *see also Stone v. Bank of Commerce*, 174 U.S. 412, 421 (1899) (holding attorney cannot "accept service of process which commences the action without any authority to do so from his principal"). If agency is to be implied, "'it must be implied from all the circumstances accompanying the attorney's appointment which indicate the extent of authority the client intended to confer.'" *Gibbs*, 581 F. Supp. at 1271 (quoting *United States v. Bosurgi*, 343 F. Supp. 815, 817–18 (S.D.N.Y. 1972) (footnotes omitted) (further citation omitted)).[10]

Plaintiff relies on the communications in the form of two letters between the government and Mr. Yackshaw prior to the filing of the complaint for its assertion that Mr. Yackshaw was "representing the defendant regarding the penalty notice * * * and regarding the Government's subsequent actions to collect the penalty." (Pl.'s Br. at 6 (citation omitted).) The first letter from Mr. Yackshaw to Customs pertains solely to the administrative penalty stage of the proceedings and although arising from the same transactions, it is separate and distinct from this civil action. Courts generally have held that an attorney representing a defendant in one action has no implied authority to accept service of process on behalf of the client in another action. *See J. & L. Parking Corp. v. United States*, 834 F. Supp. 99, 102 (S.D.N.Y. 1993) (finding an attorney did not become a client's agent for service of process simply because the attorney represented the client in an earlier "albeit related" action) (citations omitted), *aff'd*, 23 F.3d 397 (2nd Cir. 1994); *Davis-Wilson v. Hilton Hotels Corp.*, 106 F.R.D. 505, 508 (E.D. La. 1985) ("Service cannot generally be made on an attorney retained by a corporate defendant, unless the attorney has been specially authorized and designated by defendant to receive service of process.") (citations omitted). The Court rejects any assertion that Mr. Yackshaw's representation of Ziegler Bolt in an administrative proceeding commenced under rules and standards different from this civil action bestows upon Mr. Yackshaw the implied authority to accept service in this action.

Furthermore, the last sentence of the letter Mr. Yackshaw sent to Customs states, "In the future, please forward to me a copy of any information request *you may serve upon Ziegler Bolt.*" (Letter from Matthew Yackshaw to Thomas Guastini, Customs Special Agent of 1/29/90 at 2, *reprinted in* Pl.'s Br. App. at 2 (emphasis added).) If Mr. Yackshaw had the authority to accept service of process on behalf of Ziegler Bolt, there

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[10] In one case where an attorney was deemed able to receive service on behalf of defendant, the attorney enjoyed broad powers to bind the principal. *See, e.g., Durbin Paper Stock*, 97 F.R.D. at 639–40 (finding attorney who was exclusive liaison between plaintiff and defendant on all matters relating to joint venture agreement, travelled constantly with defendant, received all correspondence between plaintiff and defendant, and held himself out as person with whom to make all arrangements was "more than the defendant's attorney, he was the defendant's business agent in fact"). In the present case, however, no evidence has been submitted suggesting Mr. Yackshaw has the power to bind defendant Ziegler Bolt on any matters.

would have been no need to include this language in the letter to Customs. This constitutes additional evidence, furnished by the plaintiff, that Mr. Yackshaw did not have the authority to accept service of process on behalf of Ziegler Bolt.

The second letter plaintiff cites to support its argument that Mr. Yackshaw was representing the defendant is a letter from plaintiff's counsel to Mr. Yackshaw before this civil action was commenced. (*See* Letter from Patricia L. Petty to Matthew Yackshaw of 2/24/93, *reprinted in* Pl.'s Br. App. at 3.) There is no indication in the letter that Mr. Yackshaw agreed to represent Ziegler Bolt in any subsequent civil action. In the letter, plaintiff's counsel refers to the impending expiration of the statute of limitations and requests, "In the event that you are interested in discussing this matter, we will need a waiver of the statute of limitations, *to be executed by an appropriate officer of Ziegler as well as by Mr. Ziegler,* along with a corporate resolution." *(Id.* (emphasis added).) This language undermines plaintiff's assertion that Mr. Yackshaw had the authority to act as a general agent for Ziegler Bolt. That is, if Mr. Yackshaw had general authority to act on behalf of the corporation, there would have been no need to refer to "an appropriate officer of Ziegler" as the person with authority to sign the waiver.

Plaintiff also alleges defendant's conduct induced plaintiff to believe service upon Mr. Yackshaw was proper. Plaintiff's assertion that "by its motion, the defendant for the first time advises the Court and the plaintiff that Mr. Yackshaw did not have authority to accept service" is unfounded. (Pl.'s Br. at 11.) Defendant raised two affirmative defenses relating to service in its answer thereby alerting plaintiff that defendant was challenging service of process. This was all defendant was obligated to do under the rules. *See* U.S. CIT R. 12(b). Defendant had no obligation to explain the insufficiency of service of process or the Court's lack of personal jurisdiction in its answer. A straightforward reading of the rules reveals that defendant need only assert those defenses to preserve them. *See* U.S. CIT R. 12(b), (h).

Plaintiff's argument that because defendant "has extensively participated in discovery and filed various motions," plaintiff was "led to believe that Mr. Yackshaw was implicitly authorized to accept service on behalf of defendant" is similarly flawed. Defendant's participation to protect its interests was not designed to mislead plaintiff that somehow Mr. Yackshaw had been implicitly authorized to accept service of process on behalf of Ziegler Bolt. Defendant was only endeavoring to defend itself. Presumably, defendant chose to participate in discovery and not raise the defenses asserted in the answer by motion because it furthered defendant's interests so to do. Following plaintiff's reasoning, defendant should have sat on its hands after asserting its defenses in the answer. Defendant wisely chose to avoid this tack and the possibility of discovery sanctions or worse, a potential default. The Court perceives no reason to penalize defendant for defending itself with vigor.

D. *Waiver of Affirmative Defenses:*

Plaintiff contends defendant waived its defenses of insufficiency of service of process and lack of personal jurisdiction by failing to pursue these defenses and by not raising them in defendant's summary judgment motion. By participating in discovery and filing motions to preserve its interest, plaintiffs suggests, defendant submitted itself *in personam* to the jurisdiction of this Court and waived the insufficiency of service of process defense raised affirmatively in the answer. The Court is unpersuaded by plaintiff's arguments and finds defendant acted in accord with the Court's rules and duly preserved its defenses by raising them in the answer.

It is axiomatic that "[b]efore a federal court may exercise personal jurisdiction over a defendant, the procedural requirement of service of summons must be satisfied." *Omni Capital Int'l v. Rudolf Wolff & Co.*, 484 U.S. 97, 104 (1987). The rule governing the service of a summon and complaint in this Court is substantially the same as FRCP 4 and is to be construed strictly because "absent waiver, incomplete or improper service will lead the court to dismiss the action." *Grammenos v. Lemos*, 457 F.2d 1067, 1070 (2nd Cir. 1972) (discussing FRCP 4) (citations omitted); *see also Gulley v. Mayo Found.*, 886 F.2d 161, 165 (8th Cir. 1989) (stating majority rule is that "the provisions of Rule 4(c)(2)(C)(ii) are to be strictly complied with") (citations and internal quotations omitted).[11] There is no dispute defendant preserved the affirmative defenses of the lack of personal jurisdiction and insufficiency of service of process when defendant included those defenses in its first responsive pleading—the answer to the complaint. *See* U.S. CIT R. 12(b), (h).

Plaintiff's contention that defenses duly preserved under the rules can be waived by subsequent conduct, may have force in some circumstances, but none appear here. Plaintiff received timely notice of defendant's affirmative defenses at the earliest possible time in the proceeding. Plaintiff now complains defendant's conduct somehow misled plaintiff. If plaintiff had proceeded with diligence in pursuing its remedies as to the affirmative defenses raised in the answer, plaintiff could easily have cured the jurisdictional defects asserted by defendant. Defendant's obligation to plaintiff ended when defendant properly served plaintiff with the answer. The Court finds the defendant promptly and adequately notified plaintiff of its defenses.

Plaintiff alleges defendant abandoned its defense of the lack of personal jurisdiction and indicated its intent to submit to this Court's jurisdiction because it had notice of the complaint and because defendant actively participated in this action through discovery and the filing and responding to numerous motions. *(See* Pl.'s Br. at 15.) The Court has little difficulty rejecting plaintiff's contention that actual notice cures defective service of process. Courts have long recognized that actual

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[11] Although some courts believe "[s]trict conformity with the provisions of [FRCP 4] is not required in every instance," *Krank v. Express Funding Corp.*, 133 F.R.D. 14, 17 (S.D.N.Y. 1990), the "Rules are, of course, to be construed so as to do substantial justice." *Santos v. State Farm Fire and Casualty Co.*, 902 F.2d 1092, 1096 (2nd Cir. 1990).

knowledge of a claim is insufficient to confer jurisdiction over the person. *See Grand Entertainment Group Ltd. v. Star Media Sales, Inc.*, 988 F.2d 476, 492 (3rd Cir. 1993) ("[N]otice cannot by itself validate an otherwise defective service. Proper service is still a prerequisite to personal jurisdiction * * *. Notice to a defendant that he has been sued does not cure defective service."); *Friedman v. Estate of Presser*, 929 F.2d 1151, 1155 (6th Cir. 1991) ("actual knowledge of the law suit does not substitute for proper service of process under Rule 4(c)(2)(C)(ii)") (citations omitted); *Ransom*, 437 F.2d at 518 ("[C]learly mere notice is not a sufficient ground upon which a court can sustain the validity of service of process * * *.") (citation and internal quotations omitted).

Plaintiff's argument that defendant's participation in this action bars defendant from asserting its defenses also fails. *See Classic Motel, Inc. v. Coral Group, Ltd.*, 149 F.R.D. 528, 532 (S.D. Miss. 1993) (Defendant's "participation in this case prior to this court's ruling on a dispositive motion waive his right to assert the defense of lack of personal jurisdiction which [defendant] preserved when he raised it in his responsive pleading."). In *Schwarz*, the Court of Appeals rejected the argument that service made on an unauthorized person may not be quashed because of a lapse of time in moving to quash. *Schwarz*, 222 F.2d at 309. The court cited an earlier case of defective service where the District of Columbia Circuit held:

> If in fact there were no service, the proceedings as to [defendant] were void from the very outset * * *. No lapse of time can serve the plaintiff. The lack of jurisdiction of the court cannot be cured by the running of months or even years where the court had no jurisdiction to proceed against [defendant] in the first place.

Williams v. Capital Transit Co., 215 F.2d 487, 490 (D.C. Cir. 1954) (citations omitted) (quoted in *Schwarz*, 222 F.2d at 309).

Some courts appear willing to foist upon defendants who challenge service the obligation, not found in the rules, to seek discovery immediately to ascertain whether service was proper and if service was not proper, to move to dismiss at the earliest opportunity.[12] This Court rejects the adoption of court-imposed obligations unauthorized by the rules that may effectively force defendants to waive their legitimate affirmative defenses, such as the statute of limitations, which have been properly asserted in their answers. Defendants should not be obligated beyond that which is required by the rules to further educate inattentive plaintiffs that service of process is defective. Furthermore, there is no standard authorized by the rules for courts to properly measure such obligations. This Court believes the better practice and the one consistent with procedural fairness is to abide by the Court's rules and require only that the defendant raise its defenses in a timely manner. Defendant's

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[12] *Burton*, 106 F.R.D. at 481. See also Santos, 902 F.2d at 1095 (stating "to the extent that a defense of lack of personal jurisdiction is based on delivery of the summons and complaint to a non-agent of the defendant, that basis should be clearly specified") (citation omitted). *Contra Benjamin v. Grosnick*, 999 F.2d 590, 592 (1st Cir. 1993) (considering a Rule 4(j) determination, "there is no requirement that a defendant specify the source of the defect in the service"), *cert. denied*, 114 S. Ct. 1057 (1994).

obligation is to abide by the directive in the Court's rules to "state in short and plain terms the party's defenses." U.S. CIT R. 8(c). The plaintiff is then on notice and is in the best position to challenge the defenses raised. Plaintiff chose to ignore the defenses raised in the answer at its own peril. Apparently, plaintiff failed to take notice of the affirmative defenses, given plaintiff's characterization of the defenses as a "part of a laundry list" of "possible defenses that the defendant may or may not pursue." (Pl.'s Br. at 8.)

Once defendant raised its defenses, thereby preserving them under the rules, defendant had the right to strategically and tactically decide the most advantageous time to assert them. For example, defendant might have perceived it advantageous to raise the defenses at the time of trial or by timely motion. In any event, once the defenses were raised in the answer, plaintiff had early notice and ample opportunity to cure any defects in service of process. Plaintiff can hardly be heard to complain at this juncture that defendant did not give further notice of its defenses. To find otherwise and permit plaintiffs to ignore affirmative defenses raised in the answer in such a cavalier manner would seem to undermine an important purpose of the rules—fair notice.

Plaintiff further argues defendant's pending motion is "unseasonable and * * * waived pursuant to Rule 12(g)," which provides:

> (g) *Consolidation of Defenses in Motion.* A party who makes a motion under this rule may join with it any other motions herein provided for and then available to the party. If a party makes a motion under this rule but omits therefrom any defense or objection then available to the party which this rule permits to be raised by motion, the party shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in subdivision (h)(2) of this rule on any of the grounds there stated.

U.S. CIT. R. 12(g). The immediate difficulty with plaintiff's argument is that Rule 12(g) pertains to motions made under Rule 12. 5A Wright & Miller § 1386 at 731 ("The prohibition in Rule 12(g) against successive motions expressly covers only motions under 'this rule,' which, of course, means motions authorized by Rule 12."). Prior to the pending motion, however, defendant had not filed a Rule 12 motion in this action. Defendant's summary judgment motion was filed pursuant to U.S. CIT R. 56. (Def.'s Mot. for Summ. J. at 1.) Plaintiff addresses this disparity by arguing Rule 12(g) has been read broadly to include not only Rule 12 motions, but Rule 56 summary judgment motions as well. (Pl.'s Br. at 16 (citing *Burton,* 106 F.R.D. at 481).) In *Burton*, the court considered whether the defendant was barred from moving to dismiss based on allegations of lack of personal jurisdiction after defendant had asserted that defense in its answer. *Burton,* 106 F.R.D. at 480. The defendant, however, failed to raise the defense in its motion for summary judgment. The court stated in dicta, "Although defendants are not barred by the literal provisions of Rule 12(g), their failure to include objections to service of process in their Rule 56 motion is another example of their failure to take advantage of an opportunity to contest service of process." *Bur-*

ton, 106 F.R.D. at 482 (citing Wright & Miller § 1387 at 843).[13] Interestingly, Wright & Miller mention *Burton* in the revised edition of their text commenting,

> A motion for summary judgment under Rule 56 is not a Rule 12 motion and technically subdivision (g) [of Rule 12] does not prohibit a later filed Rule 12(b) motion. However, at least one court has recognized that the spirit of Rule 12(g) is violated when a motion challenging service of process is filed after a summary judgment motion was made.

5A Wright & Miller § 1387 at 734 (citing *Burton*, 106 F.R.D. at 482)). The commentators continue stating, "This seems sound since *when both the Rule 12 and the summary judgment motions present similar grounds for dismissal*, the policies underlying the consolidation philosophy of Rule 12(g) begin to become relevant." *Id.* (emphasis added). In this action, however, the grounds defendant raised in its summary judgment motion[14] are not similar to the grounds raised in the pending motion to quash service and to dismiss the complaint—insufficiency of service of process and lack of personal jurisdiction. Because no congruence exists in the grounds for dismissal in the two motions, the policy concerns raised by *Burton* and Wright & Miller do not come into play.

Additionally, when defendant filed its Rule 56 motion for summary judgment, defendant made clear it was moving for summary judgment only on those issues where the facts were undisputed. Defendant stated, "In light of certain undisputed facts, Ziegler Bolt believes it is appropriate to move for summary judgment at this time." (Def.'s Mot. for Summ. J. at 4 (footnote omitted).) Defendant recognized there were other issues, perhaps including its defenses of insufficiency of service of process and lack of personal jurisdiction, that defendant could not raise because the facts were in dispute. (*Id.* at 4 n.1 ("While the facts supporting Ziegler Bolt's motion for summary judgment are clear and undisputed in the record of this case, there are numerous questions of fact related to many of the key allegations of Plaintiff's complaint * * *.").) The Court therefore rejects plaintiff's argument that defendant waived the defenses asserted here by failing to raise the defenses in its motion for summary judgment.

CONCLUSION

On the basis of the foregoing findings and discussion of law, the Court reaches the following conclusions of law. Mr. Yackshaw, counsel for de-

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[13] It is not clear, however, that it would be proper to raise the defenses of insufficiency of service of process and lack of personal jurisdiction in a summary judgment motion. As one court stated, because "the defense of improper service involves a matter in abatement and does not go to the merits of the action, the present application is improperly brought by a motion for summary judgment under Rule 56 F.R.Civ.Pro." *Marple Community Record, Inc.*, 335 F.Supp. at 101; *see also Indium Corp. of America v. Semi-Alloys, Inc.*, 781 F.2d 879, 883 (Fed. Cir. 1985) (declaring motion to dismiss for lack of subject matter jurisdiction improperly raised in summary judgment motion because motion for summary judgment seeks judgment on the merits while a motion to dismiss "seeks a judgment in abatement, in that it does not bar future claims"), *cert. denied*, 479 U.S. 820 (1986).

[14] In its summary judgment motion, defendant sought judgment in its favor asserting: (1) the action was barred by the statute of limitations; (2) a lack of specific evidence of fraud; (3) a denial of administrative substantive and procedural due process; (4) a violation of the double jeopardy clause; and (5) a violation of the excessive fines clause. *See United States v. Ziegler Bolt & Parts Co.*, Slip Op. 95-3 at 7-8 (Jan. 13, 1995).

fendant, had no express or implied authority to accept service of process on behalf of defendant corporation Ziegler Bolt. The return of the signed Acknowledgement Form in this action did not constitute acceptance of service on behalf of Ziegler Bolt. Defendant properly preserved the defenses of insufficiency of service of process and lack of personal jurisdiction by raising the defenses in the answer in accordance with the Court's rules. Neither defendant's participation in this action nor defendant's filing of a motion for summary judgment waived the defenses raised in defendant's answer. Plaintiff failed to effect service of the summons and complaint upon defendant Ziegler Bolt within 120 days after the action was commenced as required by U.S. CIT R. 4(h) (1993) and therefore this action is dismissed.[15]

(Slip Op. 95–62)

CONOCO, INC., ET AL., PLAINTIFFS *v.*
U.S. FOREIGN-TRADE ZONES BOARD, ET AL., DEFENDANTS

Court No. 90–06–00289

Plaintiffs move for judgment on the agency record to challenge certain conditions imposed by the United States Foreign-Trade Zones Board upon the grants of foreign-trade subzones to plaintiffs Conoco and Citgo. Defendants cross-move for judgment on the agency record.

Held: (1) The Foreign-Trade Zones Board has the authority to impose conditions on the grant of a foreign trade subzone application which require subzone operators to (a) pay duties on foreign crude oil consumed in their subzones and (b) elect "privileged foreign status" for foreign crude oil entered into their subzones; and (2) the Foreign-Trade Zones Board decision to impose the foregoing conditions was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" under 5 U.S.C. § 706(2)(A) (1988). Plaintiffs' motion for judgment on the agency record is denied and defendants' cross-motion for judgment on the agency record is granted.

(Dated April 13, 1995)

Holland & Hart (William F. Demarest, Jr. and *Adelia S. Borrasca)* and *Lisa L. Bagley,* for plaintiff Conoco, Inc.

Charles M. Floren, for plaintiff Citgo Petroleum Corp.

Frank W. Hunger, Assistant Attorney General of the United States; *Joseph I. Liebman,* Attorney-in-Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Carla Garcia-Benitez); Robert J. Heilferty,* Attorney-Advisor, Office of the Chief Counsel for Import Administration, United States Department of Commerce, of Counsel, for defendant.

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15 "Dismissal of an action is mandatory under Rule 4(j) when the 120 day limit is violated unless 'good cause' can be shown." *Yosef v. Passamaquoddy Tribe,* 876 F.2d 283, 287 (2nd Cir. 1989), *cert. denied,* 494 U.S. 1028 (1990). The Court's Rule 4(h) is the same as the FRCP 4(j) in that it permits service beyond 120 days from commencement of the action upon a showing of good cause why plaintiff was unable to serve within that time. *See* U.S. CIT. R. 4(h). Plaintiff has not invoked the good cause exception, even in the alternative. The Court discerns no good cause evident here considering plaintiff had early notice of the challenges to service and failed to respond in a manner "consistent with a recognition that 120 days may otherwise mark the death of the action." *See General Int'l Marketing Group,* 14 CIT at 548, 742 F. Supp. at 1176 (citing David D. Siegel, *Practice Commentary on Amendment of Federal Rule 4 (Eff. Feb. 26, 1983) with Special Statute of Limitations Precautions,* 96 F.R.D. 88, 103, 109 (1983)).

OPINION

CARMAN, *Judge:* Plaintiffs move for judgment upon the agency record pursuant to U.S. CIT R. 56.1 to challenge certain conditions imposed by the United States Foreign-Trade Zones Board (FTZB or Board) upon the grants of foreign-trade subzones to plaintiffs Conoco, Inc. (Conoco) and Citgo Petroleum Corporation (Citgo). Defendants cross-move for judgment upon the agency record. This Court has jurisdiction under 28 U.S.C. § 1581(i)(1), (4) (1988) and, for the reasons which follow, enters judgment for defendants.

I. BACKGROUND

This case is presently before the Court after remand to the FTZB. *See Conoco, Inc. v. United States Foreign-Trade Zones Bd.*, 18 CIT ___, 855 F. Supp. 1306 (1994) *(Conoco III)* (remanding the action to the Board). The dispute underlying this action arises from the Board's decision to impose two conditions upon approving foreign-trade subzone applications for plaintiffs Conoco's and Citgo's crude oil refineries at the Port of Lake Charles, Calcasieu Parish, Louisiana. *See id.* at ___, 855 F. Supp. at 1308–09. The two conditions require Conoco and Citgo

> (1) [to pay] duties * * * on foreign crude oil used as fuel (or refined into products used as fuel) in the refineries; and
> (2) * * * [to] elect "privileged foreign status" for foreign crude oil brought into their respective subzones, *i.e.*, elect to pay duties on the value of that crude oil as opposed to the value of refined products produced therefrom.

Conoco, Inc. v. United States Foreign-Trade Zones Bd., 12 Fed. Cir. (T) ___, ___, 18 F.3d 1581, 1583 (1994) (Conoco II) (footnote omitted). Plaintiffs Conoco and Citgo initiated this action to challenge the imposition of the foregoing conditions on their subzone grants.

This Court previously remanded the action to the Board because "the Board failed to articulate the basis upon which it decided to impose the challenged conditions on Conoco's and Citgo's subzone grants." *Conoco III*, 18 CIT at ___, 855 F. Supp. at 1312. The purpose of the remand was to allow the Board an opportunity to explain fully "the rationale underlying its decision to condition Conoco's and Citgo's subzone grants" and, in particular, "whether and in what manner the conditions it has imposed on * * * [the] grants serve the public interest." *Id.* at ___, 855 F. Supp. at 1312–13.

The Board issued its *Remand Determination* on July 29, 1994. In its *Remand Determination*, the Board set forth its rationale for imposing the two conditions at issue. In brief, with respect to the condition that plaintiffs pay duties on fuel consumed in their subzones, the Board reasoned the Foreign-Trade Zones Act (FTZA or Act) does not shield products consumed in subzones from duties. *Remand Determination* at 1; *see also id.* at 22. The Board added that, even if the Act afforded such protection, allowing plaintiffs to consume fuel in their subzones duty-free would not be in the public interest "because it would give them an un-

warranted economic advantage over other domestic refiners." *Id.* at 2; *see also id.* at 22–23.

As to the second condition requiring plaintiffs to elect privileged foreign status for foreign crude oil brought into their subzones, the Board noted it imposed the condition after considering several factors. Specifically, the Board indicated it considered the following factors: (1) the amount of import displacement that would arise from granting plaintiffs inverted tariff benefits, that is, the extent to which granting inverted tariff benefits to plaintiffs would cause value-added production activity that would otherwise be conducted abroad to occur in the United States; (2) domestic opposition to plaintiffs' subzone applications; (3) an analysis of oil refinery subzones undertaken by the United States Department of Commerce's Office of Energy (Office of Energy); and (4) the inverted tariff savings that would inure to plaintiffs if plaintiffs were to elect non-privileged foreign status for foreign crude entered into their subzones. *Id.* at 16–21; *see also id.* at 2. According to the Board, a review of these factors indicated "there was no public benefit" in allowing plaintiffs "to choos[e] the tariff rate on finished products." *Id.* at 21.

II. Contentions of the Parties

A. *Plaintiffs:*

Plaintiffs challenge the FTZB's *Remand Determination* on several grounds. With respect to the Board's treatment of the first condition, plaintiffs advance three separate arguments. First, plaintiffs contend the Board misconstrued the precedents established by the Court of Appeals for the Federal Circuit (CAFC) and the Customs Court pertaining to the Board's authority to make merchandise consumed within subzones dutiable. (Pls.' Comments at 2–5 (citing *Nissan Motor Mfg. Corp., U.S.A. v. United States,* 12 CIT 737, 693 F. Supp. 1183 (1988), *aff'd,* 7 Fed. Cir. (T) 143, 884 F.2d 1375 (1989); *Hawaiian Indep. Refinery, Inc. v. United States,* 81 Cust. Ct. 117, 460 F. Supp. 1249 (1978), *appeal dismissed,* 66 C.C.P.A. 135 (1979) *(HIRI)).)* According to plaintiffs, *HIRI* indicates the FTZA precludes the Board from making refinery fuel consumed in trade zones dutiable so long as the zone operator (1) enters the crude oil into its zone "for a purpose authorized by the * * * Act and (2) the refined products consumed as refinery fuel never enter [ ] * * * the Customs Territory of the United States." *(Id.* at 3 (citing *HIRI,* 81 Cust. Ct. at 125, 460 F. Supp. at 1256).) Plaintiffs further argue the decisions of the Court of International Trade (CIT) and the CAFC in *Nissan* "did not overrule or even question the underlying validity of *HIRI"* because, consistent with *HIRI,* the decisions relied on the purpose for which the zone operator entered the merchandise in question to determine whether the merchandise was entitled to duty-free treatment. *(Id.* (citing *Nissan,* 7 Fed. Cir. (T) at 147, 884 F.2d at 1378; *Nissan,* 12 CIT at 740–42, 693 F. Supp. at 1186–87).) Consequently, to the extent the Board asserts *Nissan* overruled *HIRI* to support its position that the FTZA

does not authorize a "fuel-consumed" benefit, plaintiffs maintain the Board's position must fail.

Similarly, plaintiffs suggest the Board's interpretation of *Nissan* marks a departure from the Board's past practice of recognizing a fuel-consumed benefit under the Act. As evidence of the Board's change in practice, plaintiffs point to the fact that the Board has not taken steps to have duties imposed on fuel consumed in any of the refinery subzones which the Board approved prior to 1988. Moreover, plaintiffs contend, contrary to the defendants' assertions "[t]he timing of the imposition of the fuel-consumed condition and the *Nissan* decision cast further doubt on the Board's claim that the imposition of the fuel-consumed condition was supported by the Board's long-standing interpretation of the FTZ Act based upon *Nissan*." *(Id.* at 4.) Plaintiffs maintain the Board first imposed a fuel-consumed condition in a subzone grant dated March 31, 1988. *(Id.* (citing *Application of the South Louisiana Port Commission for a Subzone at the TransAmerican Natural Gas Corporation,* 53 Fed. Reg. 11,539 (Foreign-Trade Zones Board 1988) (resolution and order approving application)).) The *Nissan* decision, however, was issued over four months later.

The third principal contention plaintiffs raise on the issue of the fuel-consumed condition is that this Court must reject the Board's *Remand Determination* as an "impermissible *post hoc* rationalization." *(Id.* at 5 (footnote omitted).) Plaintiffs maintain the Board did not base its *Remand Determination* on the Examiner's Report and the Decision Memorandum which underlie the Board's original determination. Under the Board's internal procedures, plaintiffs claim, "the Examiner's Report and the Decision Memorandum are necessarily the basis for the Board's actions." *(Id.)* Furthermore, plaintiffs argue, counsel for defendants previously asserted "that these documents were in fact the basis for the Board's initial determination." *(Id.)* To further support their claim that the Board's *Remand Determination* constitutes a post-hoc rationalization, plaintiffs underscore the fact that the members of Board who issued the *Remand Determination* "played no part in the original decision." *(Id.* at 6.)

With respect to the Board's treatment of the second condition requiring plaintiffs to elect privileged foreign status for crude oil entered into their subzones, plaintiffs advance two separate arguments. First, plaintiffs contend the Board changed its past practice of freely allowing subzone grantees to elect non-privileged foreign status by requiring plaintiffs to demonstrate why the Board should allow plaintiffs to elect non-privileged foreign status. Plaintiffs charge the Board disregarded that the burden placed on plaintiffs in this case marks a departure from the Board's past practice.

The second argument raised by plaintiffs is that the Board improperly assumed subzone grantees are "entitled only to those zone benefits specifically authorized by the Board." *(Id.* at 7.) According to plaintiffs, subzone grants *by themselves* confer a "full panoply of statutorily

authorized zone benefits," including the right to elect non-privileged foreign status. *(Id.* at 8.) Additionally, similar to its argument regarding the burden of proof in this case, plaintiffs maintain the Board's decision to limit plaintiffs' benefits under their subzone grants represents a change in practice.

Finally, plaintiffs pose two general challenges to the Board's *Remand Determination*. Plaintiffs fault the Board for not considering the competitive impact on plaintiffs of requiring plaintiffs to pay duties on fuel consumed in their subzones while the companies' competitors, who obtained subzone status prior to the Board's change in policy, are not required to pay such duties. Additionally, plaintiffs claim the Board did not provide any reasons for imposing the conditions and for diverging from its earlier policies, and did not explain how it acted within the scope of its authority. Even if one assumes the Board did act within the scope of its authority, plaintiffs argue, the alleged factors the Board considered in imposing the conditions amount to nothing more than "a speculative concern that there would be an adverse competitive impact on non-FTZ refiners as a result of an unconditional grant of subzone status to Conoco and CITGO." (Pls.' Reply Comments at 2–3.) Plaintiffs argue the Board's "speculative concern" is not supported by record evidence and, in fact, "is in plain contradiction to the record." *(Id.* at 3–4 (citation omitted).) In sum, based on the foregoing deficiencies underlying the *Remand Determination*, plaintiffs argue the imposition of the challenged conditions is arbitrary and capricious.

B. *Defendants:*

Defendants advance several reasons in support of the Board's decision to impose conditions on Conoco's and Citgo's subzone grants. First, as a general matter, defendants argue the Board has the authority to impose the conditions in question. (Defs.' Comments at 2–3 (citing Defs.' Br. at 17–18).) Defendants claim the FTZA and the Board's regulations authorize the Board "to condition and restrict subzone permits where activities are contemplated that are unauthorized under the Act." (Defs.' Br. at 18.) Additionally, defendants assert case law reviewing the Board's authority indicates the Board has "'wide discretion'" to determine what activities zone operators may undertake, *(id.* at 19 (quoting *Armco Steel Corp. v. Stans,* 431 F.2d 779, 785 (2d Cir. 1970)), and "'may impose any condition which it deems advisable upon the continued operation of the refinery in the subzone,'" *(id.* (quoting *HIRI*, 81 Cust. Ct. at 126, 460 F. Supp. at 1257) (citation omitted).).

On the issue of the Board's imposition of a condition making dutiable the fuel consumed by Conoco and Citgo within the subzones, defendants argue the Board acted within the scope of its authority. Defendants claim the FTZA does not exempt fuel consumed in subzones from duties and, therefore, neither creates a fuel consumption benefit nor compels the Board to grant one. (Defs.' Comments at 3 (citing Defs.' Br. at 20–26).) In fact, defendants take "the position that not only is [the Board] *not* compelled to permit this type of benefit, the FTZ Board is

proscribed from allowing it." *(Id.* at 3 n.4; *see also Remand Determination* at 4 ("The FTZ Act does not extend zone benefits to goods consumed in zones * * *.").) Defendants maintain the Act lists various purposes for which a zone operator may enter merchandise into a zone, but does not include the consumption of merchandise or the consumption of fuel among the listed purposes. (Defs.' Br. at 20–21 (citing 19 U.S.C. § 81c (1988 & Supp. II 1990)).)[1] Therefore, defendants urge, "[p]ermitting a fuel consumption benefit would be contrary to the purposes of the FTZA." *(Id.* at 20.)

In regard to the *HIRI* and *Nissan* decisions, defendants argue that while the *HIRI* decision did result in some early applicants claiming the fuel-consumed benefit, "the FTZ Board had never formally 'decided that zone procedures allow parties to avoid Customs duties on goods consumed in zones.'" (Defs.' Comments at 6–7 (citations omitted).) Furthermore, the Board "believes that the rationale of the *HIRI* decision has been undermined by [*Nissan*]." *(Id.* at 7.)

Also in support of the fuel-consumed condition, defendants claim that the imposition of the condition was a reasonable exercise of the Board's authority under the Act. (Defs.' Br. at 26–28.) In particular, defendants note the Act expressly permits the Board to exclude from the zones "any goods or process of treatment that in its judgment is detrimental to the public interest * * *." 19 U.S.C. § 81*o*(c) (cited in Defs.' Br. at 26). According to defendants, the term "public interest" is broad enough to encompass the protection of domestic—industry the purpose for which defendants suggest the Board acted. Consequently, defendants claim plaintiffs' position improperly limits the breadth of the Board's well-established authority to account for "domestic concerns when authorizing subzone permits." (Defs.' Br. at 27.)

On the issue of the second condition imposed by the Board that requires Conoco and Citgo to elect "foreign privileged status" for foreign crude oil entered into their subzones, defendants claim the Board's decision to impose this condition also was within its authority. Defendants maintain § 81*o*(c) of the FTZ Act sets forth both the time frame during which privileged foreign status remains an option for the operator and the consequences of seeking the option within the time frame. Defendants argue that the statute, however, "does *not* establish that the benefit of making such a choice is a *right* of the subzone operator which cannot be curtailed." (Defs.' Comments at 4 (citation omitted).)

Finally, defendants contend the Board did not act arbitrarily or capriciously and did not abuse its discretion in violation of the Administrative Procedures Act (APA). Instead, the Board argues it articulated a

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[1] The language from § 81c cited by defendants provides:

> Foreign and domestic merchandise of every description * * * may, without being subject to the customs laws of the United States, except as otherwise provided in this chapter, be brought into a zone and may be stored, sold, exhibited, broken up, repacked, assembled, distributed, sorted, graded, cleaned, mixed with foreign or domestic merchandise, or otherwise manipulated, or be manufactured except as otherwise provided in this chapter, and be exported, destroyed, or sent into customs territory of the United States therefrom, in the original package or otherwise * * *.

19 U.S.C. § 81c(a) (1988) (other portions of provision updated at Supp. V 1993).

"'rational connection between the facts found and the choice made'" by explaining both its decision-making process and its interpretation of the "'public interest' mandate contained in the FTZ Act." *(Id.* at 5–6 (citations omitted).) The conditions imposed on the subzone grants, defendants argue, were a clarification, not a change, of existing policy. Defendants contend that, contrary to plaintiffs' assertions regarding purportedly "unconditional" subzone grants to prior applicants, "'[w]hile the FTZ Board Order covering the three refineries [did] not contain *specific* conditions * * * [the FTZ Board] consider[ed] them to be restricted in scope based on the form of the requests made.'" *(Id.* at 6 (citing *Remand Determination* at 12–13) (footnote omitted).) Furthermore, as to the subzone applications at issue, defendants maintain the record clearly indicates the Board considered a variety of factors and the input of various agencies and departments in reaching its determination "in light of the public interest standard established by the FTZ Act." *(Id.* at 7 (citing *Remand Determination* at 15).)

III. Discussion

A. *Standard of Review:*

In *Conoco III*, this Court concluded the standard of review applicable to decisions of the FTZB appears in the APA, 5 U.S.C. § 706 (1988). *Conoco III*, 18 CIT at ____, 855 F. Supp. at 1310–11. Based on the standards prescribed by 5 U.S.C. § 706, the Court indicated it "must first 'decide whether the [Board] acted within the scope of its authority' in order to determine whether the Board's action violated § 706(2)(C)." *Id.* at ____, 855 F. Supp. at 1311 (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971) (citation omitted)). The Court further noted "[s]hould [it] decide the Board acted within the scope of its authority, the Court may then consider whether the Board's action was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law' in violation of [5 U.S.C.] § 706(2)(A)." *Id.* at ____, 855 F. Supp. at 1311 (citing *Citizens to Preserve Overton Park*, 401 U.S. at 416). The relevant provisions of the APA provide:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—
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> * * * * * * *
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> (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
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> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
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> * * * * * * *
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> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right * * *.

5 U.S.C. § 706(2)(A), (C) (1988).

B. *The Foreign-Trade Zones Board's Authority:*

The Court initially examines whether the Board imposed the disputed conditions "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(C). Such an examination requires the Court to delineate "the scope of the [Board's] authority and discretion" and to determine whether the action taken by the Board was within the boundaries of its statutorily-derived power. *Citizens to Preserve Overton Park*, 401 U.S. at 416 (citation omitted).

To ascertain the scope of the Board's authority and discretion, the Court must first review the parameters of the trade zone laws. The basic function of the zones is to allow operators to enter merchandise into the zones "for the purposes set forth in the statute 'without being subject to the customs laws of the United States.'" *Nissan Motor Mfg. Corp., U.S.A. v. United States*, 7 Fed. Cir. (T) 143, 144, 884 F.2d 1375, 1375 (1989) (quoting 19 U.S.C. § 81c (1982)). The purposes which permit zone operators to enter merchandise duty-free appear in 19 U.S.C. § 81c, which indicates the following in relevant part:

> Foreign and domestic merchandise of every description, except such as is prohibited by law, may, without being subject to the customs laws of the United States, except as otherwise provided in this chapter, be brought into a zone and may be *stored, sold, exhibited, broken up, repacked, assembled, distributed, sorted, graded, cleaned, mixed with foreign or domestic merchandise or otherwise manipulated, or be manufactured except as otherwise provided in this chapter*, and be exported, destroyed, or sent into customs territory of the United States therefrom, in the original package or otherwise * * *.

19 U.S.C. § 81c(a) (1988) (emphasis added). The effect of the foregoing statute is to "allow [ ] an enterprise operating within [a foreign-trade] zone to take advantage of favorable differentials in the tariff schedules between the rates of duty for foreign materials used in the manufacturing process and the duty rates for the finished articles." *Armco Steel Corp. v. Stans*, 431 F.2d 779, 782 (2nd Cir. 1970).

The fact that an entity may operate within a trade zone and enter foreign merchandise into the zone, however, does not shield the entity from all liability for import duties. In *Nissan*, a subzone operator, Nissan Motor Manufacturing Corp., U.S.A. (Nissan), challenged a decision by the CIT granting the United States Customs Service (Customs) summary judgment and denying Nissan's challenge of Customs' imposition duties on foreign machinery entered into the subzone for use in the production of motor vehicles. *Nissan*, 7 Fed. Cir. (T) at 143–44, 884 F.2d at 1375–76. As described by the CAFC, the CIT held "'imports * * * used or intended to be used to produce motor vehicles' are not within the activities enumerated in 19 U.S.C. § 81c (1982)." *Id.* at 145, 884 F.2d at 1377 (citation omitted). On appeal, Nissan argued the equipment entered into the subzone was not dutiable "because a foreign trade zone is considered to be outside the Customs territory of the United States." *Id.* at 145, 884 F.2d at 1376. Nissan also claimed "merchandise entered into a zone becomes

subject to duty only if the merchandise is thereafter sent into the customs territory of the United States." *Id.* at 145, 884 F.2d at 1376.

The CAFC rejected Nissan's position as overbroad. *Id.* at 146, 884 F.2d at 1377. In reaching its decision, the court agreed with the CIT's determination "that Congress signalled its intention to make the imposition of immediate duties dependent on the operations that occur in a foreign trade zone when it listed the activities that could be performed on merchandise brought into a zone." *Id.* at 146, 884 F.2d at 1377. The court added "[t]he fact that a comprehensive listing is set forth in the statute indicates that Congress did not intend a blanket exclusion from Customs duties irrespective of what is done with the imported merchandise." *Id.* at 146, 884 F.2d at 1377. Following the CIT's reasoning, the CAFC held that because Nissan entered the foreign machinery into the subzone for the purpose of consuming the machinery for the production of motor vehicles and such a purpose was not among the operations prescribed by 19 U.S.C. § 81c, Nissan's activities did not permit it to enter the machinery into its subzone duty-free. *Id.* at 147, 884 F.2d at 1378. *Nissan* thus indicates the mere fact that a subzone operator may enter foreign merchandise into its subzone does not automatically exempt the merchandise from duties. In sum, whether merchandise entered into a subzone is exempt from duties will depend upon whether the purpose towards which the subzone operator applies the merchandise is among those listed in 19 U.S.C. § 81c.

Having reviewed the parameters of the trade zone laws, the Court now turns to examining the various bases for the Board's authority. At the outset, the Court notes "Congress has delegated a wide latitude of judgment to the Foreign-Trade Zones Board to respond to and resolve the changing needs of domestic and foreign commerce through the trade zone concept." *Armco*, 431 F.2d at 788. The latitude that the legislature vested in the Board appears in various provisions of the FTZA, especially 19 U.S.C. §§ 81*o*(c), 81h (1988). Section 81*o*(c) reads as follows: "The Board may at any time order the exclusion from the zone of any goods or process of treatment that *in its judgment* is detrimental to the public interest, health, or safety." 19 U.S.C. § 81*o*(c) (emphasis added). Section 81h provides in full: "The Board shall prescribe such rules and regulations not inconsistent with the provisions of this chapter or the rules and regulations of the Secretary of the Treasury made hereunder and *as may be necessary* to carry out this chapter." 19 U.S.C. § 81h (emphasis added). These two provisions complement the Board's general grants of authority which Congress has set forth in 19 U.S.C. §§ 81b(a), 81g (1988).[2]

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[2] The pertinent portion of § 81b(a) reads as follows: "The Board is authorized * * * to grant to corporations the privilege of establishing, operating, and maintaining foreign-trade zones in or adjacent to ports of entry under the jurisdiction of the United States." 19 U.S.C. § 81b(a) (1988). Section 81g provides for the following: "If the Board finds that the proposed plans and location are suitable for the accomplishment of the purpose of a foreign trade zone under this chapter, and that the facilities and appurtenances which it is proposed to provide are sufficient it shall make the grant." 19 U.S.C. § 81g (1988).

The Board has promulgated several regulations which facilitate its administration of the trade zones. The most pertinent of these regulations for the purposes of this action are 15 C.F.R. §§ 400.101, 400.200(a), 400.702 (1986 & 1987). Section 400.101 corresponds to the Board's statutory authority under 19 U.S.C. §§ 81*o*(c) and reads as follows in relevant part:

> Any foreign and domestic merchandise, *except* such as is prohibited by law or *such as the Board may order to be excluded as detrimental to the public interest*, health, or safety may be brought into a zone without being subject to the customs laws of the United States governing the entry of goods or the payment of duty thereon * * *.

15 C.F.R. § 400.101 (emphasis added). Similarly, §§ 400.200(a) and 400.702 mirror the authority the Board derives from 19 U.S.C. §§ 81h as noted above. Section 400.200(a) provides in pertinent part: "The Board is authorized * * * [t]o grant to corporations, *subject to the conditions and restrictions of the act and of the rules and regulations made thereunder*, the privilege of establishing, operating, and maintaining foreign-trade zones * * *." 15 C.F.R. § 400.200(a) (emphasis added). Section 400.702 indicates in full *"[s]pecial conditions applicable to a particular zone may be required by the Board and inserted in the grant for that zone."* 15 C.F.R. § 400.702 (emphasis added).

Case law pertaining to the FTZA and the Board's role in effectuating the purposes of the FTZA further underscores the breadth of the Board's authority. In *Armco*, the United States Court of Appeals for the Second Circuit considered whether the Board had the authority to establish a subzone that would permit a company to build barge vessels with foreign steel entered duty-free into the subzone and to import the vessels into United States customs territory duty-free from the subzone. *Armco*, 431 F.2d at 781. By operation of 19 U.S.C. § 81c, the subzone grant enabled the operator to avoid duties totalling 7½% *ad valorem* that it otherwise would have had to pay on the steel had it imported the steel directly into the customs territory. *Id.* at 782. The operator was able to enter the completed barge vessels duty-free into the customs territory because such vessels were not subject to the tariff schedule provisions. *Id.*

Armco, a domestic steel producer, challenged the legality of the subzone's establishment. Armco argued, among other points, the Board lacked the authority to grant subzone status to the shipbuilder "because Congress did not intend the creation of a foreign trade zone * * * to be used to avoid customs duties when as a result interested domestic industries are placed at a competitive disadvantage." *Id.* at 784. The Second Circuit rejected this argument on the grounds that it involved questions "of policy which are better designed for consideration by the Congress than by a federal court." *Id.* The court went on to note the FTZA

> gives the Trade Zones Board wide discretion to determine what activity may be pursued by trade zone manufacturers subject only to the legislative standard that a zone serve this country's interests in

> foreign trade, both export and import. Because of the nature and complexity of the problem the factors entering into a Board determination are necessarily numerous, and it would seem incontrovertible that the Board must not be unduly hampered by judicial policy judgments that might cast doubt upon the wisdom of a particular Board decision.
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> * * * * * * *
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> * * * Because of the complexity and vagaries of our highly developed systems of trade, and the pressing needs for varying solutions to the problems that inevitably arise, it is imperative that the Board be permitted to experiment at the fringes of the tariff laws. As long as the Zones Board remains within the fringes and does not stray into areas clearly outside its delegated authority, a court should not interfere except for compelling reasons * * *.

Id. at 785–88 (footnote omitted). After reviewing the various factors underlying the Board's subzone grant, the *Armco* court affirmed the district court's judgment dismissing plaintiff's complaint.

In *HIRI*, the Customs Court similarly emphasized the Board's broad range of authority over the trade zones. *See HIRI*, 81 Cust. Ct. at 126–27, 460 F. Supp. at 1257 (noting the Board's authority to decide whether the FTZA authorizes a particular activity in a subzone). *HIRI* involved a subzone operator's challenge to a decision by Customs to impose duties on foreign crude oil by-products that the operator consumed in its refinery operations. *Id.* at 118–19, 460 F. Supp. at 1251. After determining Customs could not impose duties on subzone entries in order to address an activity undertaken by a subzone operator that Customs considered to be statutorily-unauthorized, the court indicated the agency must seek relief against such activity directly from the Board. *Id.* at 125–26, 460 F. Supp. at 1256–57. The *HIRI* court noted the Board has the power to redress unauthorized activity because its regulations contemplate action by the Board to redress harm caused by "any goods or process of treatment" in a trade zone. *Id.* at 126, 460 F. Supp. at 1257 (quoting 15 C.F.R. § 400.807 (1972)). The court also stressed the Board's ability to "impose any conditions which it deems advisable upon the continued operation of the [subzone facility]." *Id.* at 126, 460 F. Supp. at 1257 (citing 15 C.F.R. § 400.700 (1972)).

None of the arguments plaintiffs raised with respect to the Board's authority to impose the challenged conditions convinces the Court that the Board acted outside the scope of its statutory mandate. Under 19 U.S.C. § 81*o*(c), the Board has been granted the broad power to exclude from a subzone "any goods or process of treatment that *in its judgment* is detrimental to the public interest, health, or safety." 19 U.S.C. § 81*o*(c) (emphasis added); *see also* 15 C.F.R. § 400.101 (authorizing entry of merchandise into the trade zones "except * * * such as the Board may order to be excluded as detrimental to the public interest, health, or safety"). If the Board can exclude crude oil completely from a subzone when, in the Board's judgment, the entry of foreign crude into the subzone is "detrimental to the public interest," then the Board cer-

tainly may also condition the entry of foreign crude by requiring subzone operators to pay duties on foreign crude oil consumed and to elect privileged foreign status for foreign crude oil brought into the subzone when the Board determines entry without such conditions is detrimental to the public interest. In other words, the Board's broad power to exclude from a subzone "any goods or process of treatment that in its judgment is detrimental to the public interest, health, or safety" under 19 U.S.C. § 81*o*(c) includes the lesser powers the Board exercised in imposing the two conditions. Furthermore, instead of barring the entry of foreign crude oil into Conoco's and Citgo's subzones altogether, the Board merely precluded the two subzone operators from obtaining trade zone benefits with respect to the foreign crude oil. Such action is analogous to a decision by the Board to the deny a subzone grant—a decision that is unquestionably within its authority to make. Accordingly, this Court holds the Board did not exceed its statutory authority by imposing the two disputed conditions on the grants of Conoco's and Citgo's subzone applications.

Furthermore, the Court notes that a fair reading of the CAFC's reasoning of the FTZA in *Nissan* would seem to preclude the Board from allowing a fuel-consumed benefit. As discussed above, the CAFC in *Nissan* agreed with the CIT's underlying determination

> that Congress signalled its intention to make the imposition of immediate duties dependent on the operations that occur in a foreign trade zone when it listed the activities that could be performed on merchandise brought into a zone. The fact that a comprehensive listing is set forth in the statute indicates that Congress did not intend a blanket exclusion from Customs duties irrespective of what is done with the imported merchandise.

Nissan, 7 Fed. Cir. (T) at 146, 884 F.2d at 1377. Regarding the imported merchandise at issue in *Nissan,* the CAFC determined

> [t]he activities performed by Nissan in the foreign trade zone subzone with the imported equipment are not among those permitted by a plain reading of the statute * * *. The Act does not say that imported equipment may be "installed," "used," "operated" or "consumed" in the zone, which are the kinds of operations Nissan performs in the zone with the subject equipment.

Id. at 146, 884 F.2d at 1377. The CAFC further noted that legislative history of the 1950 amendment to the FTZA explained "[t]he amended proviso *would not authorize consumption of merchandise in a zone,* but would authorize its exportation or destruction without the payment of the liquidated duties and determined taxes thereon." S. Rep. No. 1107, 81st Cong., 1st Sess. (1949), *reprinted in* 1950 U.S. Code Cong. Serv. 2533, 2536 (emphasis added) (quoted in *Nissan,* 7 Fed. Cir. (T) at 146, 884 F.2d at 1377). Based on the above analysis, the CAFC held in Nissan that

> the importation by Nissan of the machinery and capital equipment at issue into the foreign trade zone subzone was not for the purpose

> of being manipulated in one of the ways prescribed by the statute. Instead it was to be used (consumed) in the subzone for the production of motor vehicles * * *. [S]uch a use does not entitle the equipment to exemption from Customs duties.

Nissan, 7 Fed. Cir. (T) at 147, 884 F.2d at 1378.

Plaintiffs contend, however, the FTZA does authorize a fuel-consumed benefit. Plaintiffs further contend an earlier decision by the Customs Court, *HIRI*, supports this contention, and nothing in *Nissan* is to the contrary. In *HIRI*, the Customs Court addressed the question of whether *Customs* could impose duties on foreign crude oil "used as an integral part of a permissible manufacturing process within a zone, but which never enters the Customs territory of the United States." *HIRI*, 81 Cust. Ct. at 118, 460 F. Supp. at 1251. In support of Customs' imposition of duties, the government argued "the statutory language [of § 81c] does not specifically authorize foreign merchandise to be 'consumed' as a part of the permissible manufacturing activities within a zone." *Id.* at 121, 460 F. Supp. at 1253. According to the government, because the statute did not authorize such consumption, "the general rule that all foreign merchandise imported into the United States is subject to duty unless specifically exempted, is controlling herein." *Id.* at 121, 460 F. Supp. at 1253.

The Customs Court disapproved of the government's position. The primary basis upon which the court rejected the government's stance was that the foreign crude oil at issue never actually entered the United States customs territory. *Id.* at 121–25, 460 F. Supp. at 1253–56. The court reasoned § 81c

> will permit no other interpretation but that merchandise is not subject to the customs laws while in a zone, unless the Foreign Trade Zones Act authorizes their application. [The statute] does not provide, as the Government would contend, that the customs laws are fully applicable to merchandise within a zone except to the extent that the act specifically precludes their application. [The statute's language] clearly attests to the opposite: Exemption for merchandise in a zone from the Customs law is the rule; dutiability for such merchandise under the customs law is an exception which must be specifically provided in some provision of the act. Unless specifically expressed by the Act to the contrary, the transferal of such merchandise to the Customs territory is the occurrence which makes such merchandise dutiable under the Customs laws * * *.

Id. at 122–23, 460 F. Supp. at 1254 (footnote omitted).

The second basis underlying the *HIRI* court's decision appears to be that the Board did not condition its grant of subzone status "upon the use of duty-paid fuel to serve as the source of heat in the refining process." *Id.* at 126, 460 F. Supp. at 1257 (citation omitted). The court noted even if the consumption of fuel within a trade zone were an impermissible activity, Customs could not correct such action by imposing duties. *Id.* at 125, 460 F. Supp. at 1256. Instead, the court suggested, Customs should seek redress from the Board which *"may impose any conditions*

which it deems advisable upon the continued operation of the refinery in the sub-zone." Id. at 126, 460 F. Supp. at 1257 (citing 15 C.F.R. § 400.700 (1972)) (emphasis added). Because Customs never sought the Board's intervention and accordingly the Board never had occasion to decide whether the subzone operator's fuel consumption in the subzone was authorized under the FTZA, the court concluded the court lacked the authority to decide whether such an activity was permissible under the Act. *See id.* at 125, 460 F. Supp. at 1256 (noting Congress did not intend the court "to become the arbiter of permissible and/or nonpermissible intra-trade zone activity"). In short, the court found it was outside its province "to determine in a proceeding of this character that the use of the instant merchandise, as an integral part of the intrazone refinery operation which was expressly permitted by the Board in issuing the zone permit, constituted an unauthorized activity under the act." *Id.* at 126, 460 F. Supp. at 1257.

After reviewing the *Nissan* and *HIRI* decisions, this Court finds *Nissan*'s interpretation of the FTZA diverges significantly from the interpretation given to the Act by *HIRI*. In *HIRI*, the Customs Court broadly construes 19 U.S.C. § 81c by indicating "[e]xemption for merchandise in a zone from the Customs laws is the rule [and] dutiability for such merchandise under the Customs law is an exception which must be specifically provided in some provision of the act." *Id.* at 123, 460 F. Supp. at 1254. The CAFC's decision in *Nissan*, in contrast, gives a narrow reading of the statute by emphasizing "Congress did *not* intend a blanket exclusion from Customs duties [for foreign merchandise entered into a subzone] irrespective of what is done with the * * * merchandise [in the subzone]." *Nissan*, 7 Fed. Cir. (T) at 146, 884 F.2d at 1377 (emphasis added). Instead, the appellate court found *"Congress signalled its intention to make the imposition of immediate duties dependent on the operations that occur in a foreign trade zone* when it listed the activities that could be performed on merchandise brought into a zone." *Id.* at 146, 884 F.2d at 1377 (emphasis added). Thus, unlike *HIRI* which interprets the Act to exempt all zone entries from the customs law unless the Act "specifically" provides otherwise, *Nissan* indicates zone entries will be subject to duties *unless* the activity for which the operator makes the entries is among those listed in 19 U.S.C. § 81c.

This Court adheres to the interpretation provided by the CAFC in *Nissan*. Thus, whether plaintiffs may enjoy duty-free treatment under the FTZA for fuel consumed in their respective subzones depends on whether the purpose towards which Conoco and Citgo apply the foreign crude oil is among those listed in 19 U.S.C. § 81c. This section provides that foreign and domestic merchandise may be "stored, sold, exhibited, broken up, repacked, assembled, distributed, sorted, graded, cleaned, mixed with foreign or domestic merchandise, or otherwise manipulated, or be manufactured * * *." 19 U.S.C. § 81c(a). This provision does not say imported merchandise may be "consumed." *See Nissan*, 12 CIT at 740, 693 F. Supp. at 1186 ("[I]t would distort the statute's plain lan-

guage to read in other terms such as * * * 'consumed.'"). Furthermore, as the CAFC observed in *Nissan*, the legislative history of the 1950 amendment to the FTZA explicitly provides that, "The amended proviso[3] would not authorize consumption of merchandise in a zone * * *." S. Rep. No. 1107, *reprinted in* 1950 U.S. Code Cong. Serv. at 2535–36. Thus, it appears from the plain language of the statute, the legislative history, and the CAFC's decision in *Nissan* that under the FTZA merchandise imported into a subzone for consumption is dutiable. *See Chrysler Motors Corp. v. United States*, 14 CIT 807, 815–16, 755 F. Supp. 388, 396 (1990) ("It has long been established that as a rule of statutory construction, courts should treat the plain language of [the] statute as controlling absent clear legislative intent to the contrary.") (citations omitted), *aff'd*, 10 Fed. Cir. (T) ___, 945 F.2d 1187 (1991).

A key issue arises, however, in plaintiffs' representation to this Court that "the crude oil is first manufactured into other products *before* it is used for fuel." (Pls.' Reply Br. on Pls.' Mot. for J. on Agency R. at 16 n.12.) The Board takes the position the FTZA "does not extend zone benefits to products consumed in zones, *whether or not they result from a process conducted within zones.*" *Remand Determination* at 1 (emphasis added). Thus, the question at issue is whether crude oil imported, processed, and then consumed in a subzone is imported "for the purpose of being manipulated in one of the ways prescribed by the statute." *Nissan*, 7 Fed. Cir. (T) at 147, 884 F.2d at 1378.

"It is well settled that an agency's interpretation of the statute it has been entrusted by Congress to administer is to be upheld unless it is unreasonable." *U.H.F.C. Co. v. United States*, 9 Fed. Cir. (T) 1, 10, 916 F.2d 689, 698 (1990) (citations omitted); *see American Lamb Co. v. United States*, 4 Fed. Cir. (T) 47, 54, 785 F.2d 994, 1001 (1986). Because the FTZA does not make provision for the non-dutiability of merchandise imported for consumption, the agency's interpretation of the FTZA to preclude non-dutiability for "products consumed in zones, whether or not they result from a process conducted within zones"[4] appears reasonable to the Court. Thus, this Court upholds the agency's interpretation.

As to the *Nissan* and *HIRI* decisions, this Court notes that in *Nissan*, the CAFC observed the Customs Court in *HIRI* "did not have to deal with the question at issue [in *Nissan*] of whether the initial entry into the zone was exempt." *Nissan*, 7 Fed. Cir. (T) at 147, 884 F.2d at 1378. This Court further notes the CAFC's observation in *Nissan* that the crude oil in *HIRI* "was entered into a foreign trade zone for manufacture into fuel oil products" and that "[t]his, of course, is an activity delineated by the Act." *Id.* at 147, 884 F.2d at 1378. In this case, however, the Court is abiding by the CAFC's analysis of whether the merchandise at issue is imported "for the purpose of being manipulated in one of the ways prescribed by the statute." *Id.* at 147, 884 F.2d at 1378. Here, the

[3] The proviso to which this portion of the legislative history refers removed the FTZA's prior requirement that duties be paid on merchandise remaining within a zone for over two years. *See* S. Rep. No. 1107, *reprinted in* 1950 U.S. Code Cong. Serv. at 2535–36.

[4] *Remand Determination* at 1.

Court sees no evidence that plaintiffs would import crude oil ultimately consumed for any purpose other than ultimate consumption in the subzone, even though that oil must first be processed into the correct form.[5] Furthermore, this Court also notes the *HIRI* court's finding that the question of "[w]hether the use of fuel oil as a secondary and supplemental source of fuel in the refinery of a foreign trade zone constitutes * * * a permissible activity or use is a determination to be made by the [Board]." *HIRI*, 81 Cust. Ct. at 117, 460 F. Supp. at 1249.[6]

C. *Review of the Board's Action Under the Arbitrary and Capricious Standard*

The Court now turns to the question of whether the Board's imposition of the two conditions on Conoco's and Citgo's subzone grants was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). In connection with the arbitrary and capricious standard of review, the scope of review "is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). "While [the courts] may not supply a reasoned basis for the agency's action that the agency itself has not given * * * [the courts must] uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 285–86 (1974) (citations omitted).

This Court finds the Board acted within these guidelines. The Board explained in its *Remand Determination* the bases for its original determination that approval of plaintiffs' applications was in the public interest only if subject to the two conditions. The Board explained its public interest analysis as follows:

> Under its regulations, the FTZ Board reviews proposed zone activity—whether it is conducted in general-purpose zones or subzones—to determine if it is in the public interest. The criteria involves [sic] consideration of the trade policy implications and net economic effect of the proposed activity, taking into account the overall effect on related domestic producers.

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[5] This Court views its finding as thoroughly consistent with that of the CAFC's in *Nissan*. When foreign crude is imported and subjected to a refinery process, some components of the crude are manufactured into materials that may be further refined into finished petroleum products. *See HIRI*, 81 Cust. Ct. at 120, 460 F. Supp. at 1252. These materials are not the subject of the Court's discussion. Instead, the Court is focused on that portion of the crude which "is routed back into the crude oil heater furnace, where it is flared and used as * * * [a] source of fuel for the production of heat to run the refinery." *Id.* at 120, 460 F. Supp. at 1252 (footnote omitted). This portion of the crude oil is imported and ultimately consumed just as the machinery in *Nissan* was imported, installed, and "consumed." Simply because the fuel oil consumed is mixed with other components upon entry and must undergo manufacturing prior to consumption does not negate the fuel oil's ultimate use—consumption.

[6] The Court notes this holding appears to be what underlies the CAFC's observation in *Nissan* that, "Clearly, in *[HIRI]* the crude oil was exempt at the time of entry." *Nissan*, 7 Fed. Cir. (T) at 147, 884 F.2d at 1378. In other words, whether the crude oil in *HIRI* was exempt at the time of entry was not addressed by the Court; instead, the *HIRI* court determined even if the consumption of fuel within a trade zone were an impermissible activity, Customs could not correct such an action by imposing duties.

Remand Determination at 3.[7] The Board further explained most cases involving manufacturing

> present no basic policy issues, but all require an economic evaluation. Assessment of the net economic effect involves weighing positive factors (such as increased or preserved employment, U.S. value-added activity, exports and import displacement) against potential negative factors (such as adverse effects on domestic industry that result in the loss of sales to imports of finished products, reduction in employment at plants that use few or no imported components, possible decreases in value-added activity and reduction in domestic supplier purchases, increases in imports, and market distortions). The evaluation includes considering the extent to which zone procedures affect the various factors.

Id. at 9.

In its public interest analysis of the two conditions at issue, the Board considered a number of factors. On one of those factors, import displacement, the Board noted "[b]oth the Conoco and Citgo plants ship well over 50 percent of their products into the domestic market, yet there was little evidence of a likelihood of import displacement." *Id.* at 16. Thus, the Board found "at least 88%" of plaintiffs' competition to come from other domestic refineries. *Id.* Advice from government industry analysts, the Board explained, "confirmed the fact that import competition was low and that allowing zone procedures for some refineries would likely disadvantage other domestic refineries." *Id.* at 16–17 (citation omitted).

The Board also considered domestic opposition. *Id.* at 17–18. This opposition focused "on the duty savings related to products that would enter the U.S. market. The major zone savings of concern thus involved fuel consumed and inverted tariffs." *Id.* at 17. Apparently, savings resulting from fuel consumed and inverted tariffs "could be significant enough to pose competitive problems in a low margin industry such as this one." *Id.* at 17–18 (footnote omitted).

Finally, the Board indicated in the *Remand Determination* that it considered analyses by the Office of Energy. The Board reported in the *Remand Determination* that the analyses indicated substantial refinery production in the area in question would compete with domestic products due to the low level of refinery product imports. *Id.* at 18 (quoting from the analyses). The Board further reported the analyses indicated duty-free treatment of refinery fuel would provide benefitted refiners with a "small but clear" financial advantage over non-benefitted refiners. *Id.* at 19 (quoting from the analyses).

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[7] The Board indicated it heeded concerns expressed throughout congressional committee hearings held in the late 1980s and studies performed by the United States General Accounting Office and the International Trade Commission. *Remand Determination* at 8. Concerns centered around "potential adverse impact on domestic industry resulting from zone savings on products destined for the U.S. market." *Id.* "[R]ecommendations made to the FTZ Board call for a careful review that results in granting zone benefits on products manufactured in zones for importation only when there is no trade policy conflict and there is evidence of a clear net positive economic effect and no adverse effect on domestic industry." *Id.* at 8–9.

Specifically as to the imposition of the condition requiring plaintiffs to pay duties on foreign crude oil used as fuel, the Board explained that after considering the record, domestic industry opposition, and Office of Energy analyses, the Board

> concluded that granting such a cost savings to refiners that use foreign crude oil would give them an unwarranted advantage over refiners that use domestic crude oil * * *. [T]he fact that the level of imports of finished oil products was low meant that the competitive impact of the savings would be greater on other domestic producers than on foreign refiners, resulting in a net negative economic effect.

Id. at 23. Accordingly, the Board concluded "approval of this benefit would not have been in the public interest." *Id.*

As to imposition of the condition requiring plaintiffs to elect privileged foreign status for foreign crude oil brought into the subzones, the Board explained that notwithstanding improper omissions of information necessary to complete a request for inverted tariff benefits, the Board considered this benefit in both cases. *Id.* at 21.[8] The Board considered the "impact on domestic production and employment, import displacement, domestic value-added activity, and the extent of import competition taking into account the concerns expressed by domestic industry." *Id.* The Board found

> there would be some positive effects from the savings attributable to exports and that there would be no harmful effect in granting duty-deferral on imports. However, there was no public benefit basis to extend zone authority to choosing the tariff rate on finished products on which the rate was lower (inverted tariff benefit). The record indicated that because of the low level of import competition, little displacement of imported products would occur. Most of the impact would be at the expense of other domestic refineries.

Id. The Board explained it considered the possibility that any savings from inverted tariff benefits might be low. *Id.* The Board concluded, however, "even a small savings advantage would be significant in a low margin industry such as this one." *Id.*

In light of the public interest analysis described above, the Board granted the subzone applications, but also imposed the two disputed conditions. Adoption of conditions, the Board explained, "is a preferred alternative to denying applications in their entirety, when a significant part of the positive effects can be realized if the negative effects are averted through conditions." *Id.* at 2–3. In plaintiffs' cases, "[t]he conditions in question serve the public interest because they allow zone activity to be conducted to the extent that it is within the scope of authority covered by the FTZ Act, and results in a net positive economic effect, taking into account the overall effect on U.S. industry." *Id.* at 2.

The Court finds these explanations both articulate satisfactorily the Board's determination to impose the two disputed conditions, and in-

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[8] The Board stated in the *Remand Determination* that "[w]ith respect to the inverted tariff savings, the applications and later statements by the applicants were ambiguous and inconsistent * * *. Notwithstanding such omissions and lack of clarity, inverted tariff savings were given consideration in both cases." *Remand Determination* at 19–21.

clude "'a rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43 (citation omitted). The Court finds plaintiffs' argument that the *Remand Determination* must be rejected as "a revisionist 'explanation' of the prior Board's decision" based on "a rationale * * * fundamentally different from the grounds previously relied upon by the Board" and performed by "the current Board, comprised of individuals who played no part in the original decision" of no import. (Pls.' Comments at 5–6.) In *Trent Tube Div., Crucible Materials Corp. v. United States*, 14 CIT 780, 752 F. Supp. 468 (1990), *aff'd sub nom. Trent Tube Div., Crucible Materials Corp. v. Avesta Sandvik Tube AB*, 10 Fed. Cir. (T) ___, 975 F.2d 807 (1992), this Court addressed and rejected an analogous argument aimed at the International Trade Commission (ITC).[9] The Court agreed with prior case law that "the ITC 'is a continuing institution, regardless of changes in its membership.'" *Id.* at 789, 752 F. Supp. at 476 (quoting *SCM Corp. v. United States*, 2 CIT 1, 7, 519 F. Supp. 911, 915 (1981)). "Moreover, membership changes within the [ITC] 'do[ ] not affect its power to discharge its statutory duties * * *.'" *Id.* at 789, 752 F. Supp. at 476 (quoting *Sprague Elec. Co. v. United States*, 2 CIT 302, 309, 529 F. Supp. 676, 682 (1981)). The Court finds *Trent Tube* sufficiently analogous and, indeed, controlling here. Furthermore, in the *Remand Determination*, the Board adequately described its decision-making process on zone applications and included an explanation of where an examiners committee report and final decision "package" fit in. *Remand Determination* at 5–8. The Board reports in the *Remand Determination* that the process outlined "was followed in both the Conoco and Citgo cases." *Id.* at 8.

The Court disagrees with plaintiffs' argument that imposition of the two conditions represents a change in agency practice. The Board explained past grants of subzone applications as follows. The Board's subzone grants fall into two categories: pre–1986 and post–1986. *Remand Determination* at 12. The pre–1986 subzone grants fall into two subcategories. *Id.* The first two approvals

> were special cases from the standpoint of oil policy and economic considerations based on their insular locations (HIRI, Hawaii, and Conoco, Puerto Rico) and they were not considered precedents for U.S. mainland sites. Concerns about competitive effects were minimal because these refineries were designed to serve export and local markets and they did not have direct access to the pipeline system of the contiguous states.

Id. The second sub-category of pre–1986 subzone grants involved three Texas oil refineries whose applications were approved "mainly based

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[9] In *Trent Tube*, this Court addressed a challenge to a remand determination issued by the International Trade Commission (ITC). After issuance of the original determination but prior to the issuance of the ITC's remand determination, one of the ITC Commissioners was replaced by a new Commissioner. *Id.* at 781, 752 F. Supp. at 470. While the remaining Commissioners readopted their respective views on remand, the new Commissioner's determination differed from that of his predecessor. *Id.* at 781, 752 F. Supp. at 470. As a result of the new Commissioner's determination, the remand determination became affirmative while the original determination had been negative. *Id.* at 781, 752 F. Supp. at 470. Following the remand, one party argued that because the original determination had been sustained in all respects except a portion of the replaced Commissioner's views, the remand instructions were limited to providing an adequate explanation of those views. *Id.* at 782, 752 F. Supp. at 471.

upon the potential for increased export activity." *Id.* (citation omitted). These three applications, however,

> were limited in scope. Zone savings were requested for export activity and duty deferral, but not for inverted tariff savings. Thus, [the Board] did not view inverted tariff benefits as being within their scope of authority. While [the applicants] made reference to possible savings on fuel consumed, [the Board] did not specifically authorize such a benefit because [the Board] considered it an issue to be determined by U.S. Customs. There was no opposition from domestic industry. While the FTZ Board Order covering the three refineries does not contain *specific* conditions as do the post–1986 cases, [the Board] considers them to be restricted in scope based on the form of the requests made in the applications.

Id. at 12–13.

Cases in which companies sought subzone grants after 1986 "involved a number of refineries seeking a wider range of zone savings. Unlike previous cases, these were opposed by other domestic refiners * * * and the American Independent Refiners Association." *Id.* at 13. An Office of Energy review performed at the Board's request "concluded that allowing [lower tariffs and fuel consumed] savings for refineries that use foreign crude oil would give them an unwarranted advantage over refiners that use domestic crude. The Office of Energy analyses concluded that granting zone authority for other than exports raised the potential for negative effects on domestic producers." *Id.*

Issues concerning Customs control requirements also affected the likelihood of exercise of the inverted tariff benefit. *Id.* 13–14 (pointing to a 1988 ITC report noting "certain Customs problems in devising adequate control procedures because of the complexity of the activity proposed and the nature of the refinery process") (citation omitted). Based on experimental projects and meetings with subzone applicants, Customs designed a proposed operational module for all refinery subzones. *Id.* at 14. Under Customs' proposed module, all crude oil would be placed in non-privileged status or entry would be made after the first stage of refining. *Id.* Upon objection by the operators and applicants, "Customs settled on an interim plan that called for all incoming crude being placed in privileged foreign status" as a "first-step that provided the majority of benefits sought and [diminished] interest in inverted tariff benefits." *Id.*

According to the Board's *Remand Determination*, its first post–1986 case was a 1988 decision involving a TransAmerican refinery in Gramercy, Louisiana. *Id.* The grant of the subzone application "contained restrictions on fuel consumed and inverted tariff savings, setting the stage for the cases that followed." *Id.* The five approvals that followed in 1988 and 1989, including the approvals for Conoco and Citgo, contained the same restrictions. *Id.* at 14–15. Between 1991 and 1994, the Board approved five more refinery subzones, all subject to the fuel consumed and inverted tariff restrictions. *Id.* at 15. Thus, the Board explains, it

"adopted the fuel and inverted tariff restrictions for each of the eleven subzones approved since March 1988." *Id.*[10]

Based on the Board's explanation set forth in the *Remand Determination* and outlined above, this Court rejects plaintiffs' contention that imposition of the challenged conditions constituted a change in agency practice. Each subzone application brings different facts and circumstances. The Board must be able to consider and adjust to the different facts and concerns each new application presents, and to render a decision accordingly. *See, e.g., Armco Steel Corporation v. Stans*, 431 F.2d 779, 788 (1970) ("Because of the complexity and vagaries of our highly developed systems of trade, and the pressing needs for varying solutions to the problems that inevitably arise, it is imperative that the Board be permitted to experiment at the fringes of the tariff laws."). In so doing, the Board exercises the authority granted to it by the FTZA. *See supra* part III.B; *see also Armco*, 431 F.2d at 788 ("Congress has delegated a wide latitude of judgment to the Foreign-Trade Zones Board to respond to and resolve the changing needs of domestic and foreign commerce through the trade zone concept."). Imposition of the two conditions when the Board determined grants without the conditions would not have served the public interest was an act entirely within the Board's scope of authority. *See supra* part III.B. Furthermore, "public interest" is a broad and ever-changing phrase. That which comprises "public interest" today perhaps will not tomorrow. As long as the factors the Board considers in its public interest determination are reasonable, the Court will defer to the Board. *See U.H.F.C. Co. v. United States*, 9 Fed. Cir. (T) 1, 10, 916 F.2d 689, 698 (1990) ("It is well settled that an agency's interpretation of the statute it has been entrusted by Congress to administer is to be upheld unless it is unreasonable.") (citations omitted). Moreover, as the Second Circuit recognized in *Armco*:

> Because of the nature and complexity of the problem the factors entering into a Board determination are necessarily numerous, and it would seem incontrovertible that the Board must not be unduly hampered by judicial policy judgments that might cast doubt upon the wisdom of a particular Board decision * * *.
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> * * * * * * *
>
> * * * As long as the Zones Board remains within the fringes and does not stray into areas clearly outside its delegated authority, a court should not interfere except for compelling reasons * * *.

Armco, 431 F.2d at 785–88 (footnote omitted). Finally, as discussed above, the Board has articulated satisfactorily its rationale behind the imposition of the two conditions in the particular applications at issue. Accordingly, this Court rejects plaintiffs' arguments concerning an alleged change in agency practice.

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[10] The Board adds that in the three most recent cases, it granted one exception with regard to sulfur. *Remand Determination* at 15. The Board reported this exception was possible because: (1) the applicant submitted new information indicating relatively high sulfur import levels; (2) the Board found significant foreign competition in sulfur; and (3) the Board found no adverse effect on domestic producers. *Id.*

The Court further finds unpersuasive plaintiffs' contentions the Board changed its past practice by reversing the burden of proof on applicants seeking inverted tariff benefits, and that subzone grants *by themselves* confer a "full panoply of statutorily authorized * * * benefits." (Pls.' Comments at 7–8.) As the Court found in its analysis of the Board's statutory authority, Congress granted to the Board the power to impose conditions on subzone grants when the Board finds that a grant without the conditions would not serve the public interest. As to the burden of proof, the Board explained in the *Remand Determination* that "[i]n both cases, when the matter of choosing duty rates on finished products was discussed, *the applicants were advised* that such authority could not be granted without detailed product-by-product information * * *." *Remand Determination* at 4–5 (emphasis added).[11] Yet, the Court notes, the Board reported plaintiffs "never fully supplied the information needed, nor did they make it clear inverted tariff benefits were being requested." *Id.* at 5.

Finally, the Court turns to plaintiffs' arguments regarding the Board's consideration of economic factors. First, plaintiffs contend the Board failed to consider the negative economic consequences for plaintiffs in that other subzone operators have a fuel-consumed benefit. Second, plaintiffs claim the Board's concern about the adverse competitive impact on non-FTZ refiners as a result of an unconditional grant to plaintiffs amounts to nothing more than "speculative concern" unsupported by record evidence and, in fact, is "in plain contradiction to the record." (Pls.' Reply Comments at 3–4.) As to plaintiffs' first contention, as discussed above the Court will defer to the Board's definition of factors to be considered in the "public interest" as long as those factors are reasonable. Here, the Board informs the Court through the *Remand Determination* that the grant of a fuel-consumed benefit to plaintiffs would create an "unwarranted economic advantage over other domestic refiners that use only domestic crude inputs." *Remand Determination* at 2. The Court finds even if the Board did not consider alleged negative economic effects on plaintiffs, the Board's determination that granting a fuel-consumed benefit would cause an economic disadvantage to other refiners is sufficient to constitute a finding that the grant would not be in the *public* interest. *See* 19 U.S.C. § 81o(c) ("The Board may at any time order the exclusion from the zone of any goods or process of treatment that *in its judgment* is detrimental to the *public* interest, health, or safety.") (emphasis added).

As to plaintiffs second contention, plaintiffs quote passages from Office of Energy memoranda to support their claim that "[t]he record * * * highlights the *de minimis* impact of the fuel-use and inverted tariff benefits." (Pls.' Reply Comments at 4 (citations omitted).) The Court finds this argument unpersuasive. Simply because the Office of Energy may have reached a different conclusion concerning the ultimate effect

[11] The Board explained it requires this information so that the Board "can assess economic impact from both a domestic and world market perspective." *Remand Determination* at 5.

on competition does not mean the Board had to reach the same conclusion or that the Board could not agree with other findings in the analyses. *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966) ("[T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by *substantial evidence.*") (emphasis added) (citations omitted). The Board, and not the Office of Energy, is charged with administering the FTZA. *See* 19 U.S.C. § 81b(a). For all of the reasons discussed above, the Court finds the Board's imposition of the two disputed conditions was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

IV. Conclusion

After considering all of the parties' contentions, the Court holds: (1) The Foreign-Trade Zones Board has the authority to impose conditions on the grant of a foreign trade subzone application which require subzone operators to (a) pay duties on foreign crude oil consumed in their subzones and (b) elect "privileged foreign status" for foreign crude oil entered into their subzones; (2) the Foreign-Trade Zones Board decision to impose the foregoing conditions was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" under 5 U.S.C. § 706(2)(A); (3) plaintiffs' motion for judgment on the agency record is denied; (4) defendants' cross-motion for judgment on the agency record is granted; and (5) plaintiffs' action is dismissed.

(Slip Op. 95–63)

KOYO SEIKO CO., LTD., AND KOYO CORP. OF U.S.A., PLAINTIFFS *v.* UNITED STATES, AND U.S. DEPARTMENT OF COMMERCE, DEFENDANTS, AND TIMKEN CO., DEFENDANT-INTERVENOR

Court No. 92–03–00170

(Dated April 13, 1995)

ORDER AFFIRMING REMAND RESULTS

TSOUCALAS, *Judge:* This Court, having received and reviewed the Department of Commerce, International Trade Administration's Results of Redetermination Pursuant to Court Remand, *Koyo Seiko Co., Ltd. v. United States,* Slip Op. 94–127 (Aug. 11, 1994) ("Remand Results"), and any responses to the Remand Results submitted by the parties, it is hereby

ORDERED that the Remand Results filed by the Department of Commerce, International Trade Administration, are affirmed, and it is further

ORDERED that since all other issues have been decided, this case is dismissed.

(Slip Op. 95–64)

UNIVERSAL PERCUSSION, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 92–12–00838

[Plaintiff applies for attorney fees and costs under the Equal Access to Justice Act. *Held:* Fees are awarded to plaintiff for the full amount of time requested, but for the statutory rate of $75 per hour plus filing costs.]

(Decided April 13, 1995)

Fitch, King and Caffentzis (James Caffentzis) for plaintiff.
Frank W. Hunger, Assistant Attorney General; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, United States Department of Justice, *(James A. Curley)* for defendant.

OPINION

MUSGRAVE, *Judge:* Pursuant to Rule 68 of this Court, plaintiff Universal Percussion ("Universal") seeks attorney fees and filing costs under the Equal Access to Justice Act ("EAJA"), for an action brought against the United States ("the Government"), challenging a denial by the United States Customs Service ("Customs") of protests brought by Universal for, Universal claims, improperly classifying and improperly extending liquidation of entries of merchandise.

BACKGROUND

Universal imported leather gloves into the United States in a series of entries between 1989 and 1991 which Universal described as "batting gloves," claiming a dutiable rate of 3% *ad valorem* under subheading 4203.21.20 of the Harmonized Tariff Schedule of the United States (HTSUS). Customs extended liquidation of the entries three times in order to obtain information the Government claims it needed for proper classification of the merchandise. *Defendant's Opposition to Plaintiff's Application for Fees and Other Expenses ("Defendant's Opposition"),* at 2; *Plaintiff's Complaint,* at 16–18. The entries in question were liquidated in May of 1992 as "gloves: other" under subheading 4203.29.3010, HTSUS, dutiable at a rate of 14% *ad valorem*. Universal protested claiming the gloves were properly classifiable as entered. In addition, Universal protested the extensions claiming they were not in accordance with 19 U.S.C § 1504(b)(1) and that the entries were therefore deemed liquidated at the rate claimed by Universal by operation of law under 19 U.S.C. § 1504(a).[1] Universal's protest was denied and this ac-

[1] The relevant provisions of 19 U.S.C. § 1504 in effect at the time of entry and extension of liquidation are set forth as follows:

§ 1504 Limitation on liquidation.
(a) Liquidation
Except as provided in subsection (b) of this section, an entry of merchandise not liquidated within one year from:
(1) the date of entry of such merchandise;
* * * * * * *
shall be deemed liquidated at the rate of duty, value, quantity, and amount of duties asserted at the time of entry by the importer of record * * *.

continued

tion ensued. The parties then entered a stipulated settlement agreement under which the entries were reliquidated at the rate claimed by Universal at entry. *Stipulated Judgment on Agreed Statement of Facts*, at 5. Universal, as the prevailing party, now claims attorney fees and filing costs for this action.

DISCUSSION

Awards of attorney fees are governed by the EAJA, 28 U.S.C. § 2412(d)(1)(A), which is set forth as follows:

> Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

28 U.S.C. § 2412(d)(1)(A) (1988).

The United States Supreme Court, in *Pierce v. Underwood*, 487 U.S. 552 (1988), has interpreted substantial justification as follows:

> We are of the view, therefore, that as between the two commonly used connotations of the word "substantially," the one most naturally conveyed by the phrase before us here is not "justified to a high degree," but rather "justified in substance or in the main"—that is, justified to a degree that could satisfy a reasonable person. That is no different from the "reasonable basis both in law and fact" formulation adopted by the Ninth Circuit and the vast majority of other Courts of Appeals that have addressed this issue.

Pierce v. Underwood, 487 U.S. at 565 (1988).

The Government argues that its position had a reasonable basis in law and fact and was therefore substantially justified. *Id.* at 6. The Government asserts that liquidation was extended in order to await information the import specialist believed would affect classification of the imported gloves. *Id.* at 5. Whether this information was needed, argues the Government, depended on (1) whether the information would show that the imported gloves were of the type used by drummers rather than baseball players; and (2) whether information already in the possession of the import specialist clearly showed that the gloves were or were not of the type used by baseball players. This, argues the Government, amounts to a reasonable factual basis. *Id.* at 6.

The Government further argues that it had a reasonable basis in the law for extending the liquidation. The Government asserts that, under *St. Paul Fire & Marine Ins. Co. v. United States*, 6 F.3d 763 (Fed. Cir.

(b) Extension

The Secretary may extend the period in which to liquidate an entry by giving notice of such extension to the importer of record in such form and manner as the Secretary shall prescribe in the regulations, if—

(1) information needed for the proper appraisement or classification of the merchandise is not available to the appropriate customs officer;

* * * * * * *

1993), it had a reasonable expectation that information sought in the investigation would affect classification and would be forthcoming. *Defendant's Memorandum.* at 6. Thus, argues the Government, it properly extended the liquidation. *Id.*

Lastly, the Government argues that whether its interpretation of the law and facts was correct is not the test for whether it was substantially justified, citing *Pierce* as follows:

> [A] position can be justified even though it is not correct, and we believe it can be substantially *(i.e.*, for the most part) justified if a reasonable person could think it correct, that is, if it has a reasonable basis in law and fact.

Pierce v. Underwood, 487 U.S. at 566 n. 2. The Government asserts that regardless of whether its position was factually and legally correct, its action was reasonable and substantially justified. *Defendant's Memorandum* at 7.

A settlement agreement was stipulated to by the Government at the rate claimed by Universal Percussion. That there was a such a stipulation is not, in and of itself, enough for a court to say that the Government was not substantially justified in its position in this action. In *Pierce*, the Supreme Court had this to say regarding settlements:

> Respondents contend that the lack of substantial justification for the Government's position was demonstrated by its willingness to settle the litigation on unfavorable terms. Other factors, however, might explain the settlement equally well—for example, a change in substantive policy instituted by a new administration. The unfavorable terms of a settlement agreement, without inquiry into the reasons for settlement, cannot conclusively establish the weakness of the Government's position. To hold otherwise would not only distort the truth but penalize and thereby discourage useful settlements.

Pierce v. Underwood, 487 U.S. at 568. In this case, however, the Government, in its arguments against an award of attorney fees, gives the reasons for its settlement, to wit: "because the entries were *deemed liquidated* at the rate asserted by Universal at the time of entry (emphasis added)." *Defendant's Memorandum* at 3. The Government adds that "[t]he basis for the defendant's agreement was that while the import specialist acted in a reasonable manner, liquidation nevertheless should not have been extended for the purpose of obtaining additional information which was likely to affect the classification of the gloves." *Id.* at 3. The Court finds these statements simply to be an admission that no information was needed for the proper classification of the merchandise, as required for a proper extension under 19 U.S.C. §§ 1504(b)(1); in other words, that there was no reasonable basis in law and fact to extend the liquidation as stated, hence the extension was not lawful under 19 U.S.C. § 1504(1)(b). *See also St. Paul Fire & Marine Ins. Co. v. United States,* 6 F.3d 763 (Fed. Cir. 1993). Yet the Government goes on to assert that it is not clear from § 1504(b)(1) whether such information was needed for proper classification of merchandise. *Defendant's Memo.* at

4. The Government is merely talking out of both sides of its mouth at the same time. As the Government correctly points out, the Court, in this application for fees, is to decide whether the Government was substantially justified, *i.e.*, "if a reasonable person could think it correct, that is, if it has a reasonable basis in law and fact." To argue, on the one hand, that there was reasonable basis in law and fact that information was needed, while, on the other hand, admitting that information was not needed, and that liquidation should not have been extended, seems to this Court to be so completely contradictory that it clearly demonstrates the unreasonableness of the Government's position in the first instance.

The Government claims there were special circumstances in that it was advancing a novel theory of the law. The Court finds that no theory was *advanced* by the Government. The government did not advance before the Court, to decide on the merits, the novel theory of whether information was "needed" under 19 U.S.C. § 1504(b)(1). It simply stipulated to Universal's challenge. Only now, after it is too late for a court to decide on the merits the correctness of its position, does the Government assert a theory of law. An assertion of a theory of law in defense of a position against attorney fees, after a case has been stipulated to, and, as a result of the stipulation, after a court no longer has the opportunity decide such case on the merits, does not amount to *advancing* a theory of law. No one benefits from a stipulation but the immediate parties to the action. No one need know the basis of such stipulation, or how the parties benefitted. Accordingly, the Government's claim of special circumstances is without merit.

The Court having found the government not to be substantially justified in its position, and having found an absence of special circumstances, thus warranting an award of attorney fees in principle, next turns to the issue of reasonable attorney fees. 28 U.S.C. § 2412(d)(2) states:

> (A) "fees and other expenses" includes * * * reasonable attorney fees (The amount of fees awarded under this subsection shall be based upon prevailing market rates for the kind and quality of the services furnished, except that * * * (ii) attorney fees shall not be awarded in excess of $75 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.).

28 U.S.C. § 2412(d)(2) (1988). 28 U.S.C. § 2412(d)(1)(C) further provides:

> The court, in its discretion, may reduce the amount to be awarded pursuant to this subsection, or deny an award, to the extent that the prevailing party during the course of the proceedings engaged in conduct which unduly and unreasonably protracted the final resolution of the matter in controversy.

28 U.S.C. § 2412(d)(1)(C) (1988).

The Government argues that it requested Universal to submit a proposed stipulation at the rate claimed by Universal shortly after it filed its answer, but that Universal elected to pursue discovery—which, argues the Government, accounts for most of the fees requested. *Defendant's Memorandum*, at 8–9. In so electing, the Government argues that Universal protracted final resolution of the case and needlessly increased the costs for both sides. *Id.* Moreover, argues the Government, much of the time charged by Universal (21 hours) was devoted to preparing a motion for summary judgment which was never submitted and therefore did not advance the case to final resolution. *Id.* Accordingly, the Government asks that the Court deny any award for fees and expenses, or reduce the award by disallowing fees for work done on discovery and summary judgment preparation. *Id.* at 10.

Universal argues that it was forced to conduct discovery to obtain concessions because the Government filed an answer adhering to its original classification decision even after it had modified its original position in a Headquarters Ruling Letter. *Plaintiff's Reply to Defendant's Opposition to Plaintiff's Application for Fees and Other Expenses (Plaintiff's Reply)*, at 4–5. Universal further argues that the usual stipulation procedure suggested by the Government was not a sufficient remedy for all of its entries, as the Government only sought stipulation on the deemed liquidation issue which was not involved in all of Universal's entries. *Id.* at 5–6.

The Court finds that Universal did not unreasonably protract final resolution of this case. Universal's conduct was nothing more than an effort to preserve its legal options after the case had been joined. As to the rate charged by Universal's attorneys, the Court finds no special factors which would justify an award in excess of the $75 per hour statutory rate, Nothing was put before the Court to support the claimed $275 per hour rate. The statutory rate shall, therefore, be applied to the full amount of time claimed by Universal (53.25 hours), for an award of $3,993.75.

Lastly, plaintiff claims the costs of $120 for filing its action with this Court. Filing fees are recoverable to the prevailing party under 28 U.S.C. § 2412(a). The Court finds an award for filing fees justified for the same reasons as an award for attorney fees.

CONCLUSION

For the foregoing reasons the Court finds an award for fees and costs justified. Universal's application for attorney fees is, therefore, granted, but at the statutory rate of $75 per hour for the full amount of time claimed by Universal, for an award of 3,993.75. In addition, this Court awards the cost involved in filing this action, $120, for a total award of $4,113.75.

ABSTRACTED CLASSIFICATION DECISIONS

DECISION NO. DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
C95/41 4/11/95 Tsoucalas, J.	Masterhand USA, Inc.	94–12–00746	9502.10.2000 12%	9503.41.1000 6.8%	Agreed statement of facts	Not stated Stuffed toys "Country cowgirl"

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